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FEDERAL COMMUNICATIONS COMMISSION REPORTS
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VOLUME 40 (2d Series)

Pages 103 to 232

Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

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H. REX LEE
CHARLOTTE T. REID
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BENJAMIN L. HOOKS

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F.C.C. 73-315

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART O OF THE COMMISSION'S RULES TO DELEGATE AUTHORITY TO THE CHIEF, SAFETY AND SPECIAL RADIO SERVICES BUREAU, TO ACT ON REQUESTS FOR WAIVERS OF PART 97 AS THEY RELATE TO AMATEUR RADIO SPACE STATIONS

ORDER

(Adopted March 21, 1973; Released March 26, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER REID AND HOOKS DISSENTING.

1. Since 1961 six amateur communication satellites have been placed into orbit. The newest satellite, OSCAR 6, was launched on October 15, 1972, and has been successfully transmitting amateur radiocommunication since that date.

2. In order to allow the operation of an amateur radio space station on board a satellite, it is necessary that a number of rules contained in Part 97 of the Commission's Rules be waived. Therefore, to facilitate the orderly and efficient regulation of amateur radio space stations, while they are in their present experimental stage, delegated authority is granted to the Chief, Safety and Special Radio Services Bureau to act on such waiver requests of the provisions of Part 97. Waivers granted under this delegated authority will be limited to rules regarding station location, authorized emissions, station control, identification, logging and operator privileges.

3. Authority for the rule adopted herein is contained in §§ 4(i), 5(d) and 303 of the Communications Act of 1934, as amended. Since this change involves only a matter of internal Commission organization, the prior notification requirement of 5 U.S.C. § 553 is not applicable.

4. IT IS ORDERED, effective May 3, 1973, that Part O of the Commission's Rules is amended as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

Attachment.

APPENDIX

In Part O of Chapter I of Title 47 of the Code of Federal Regulations, § 0.331(b)(24) is added to read as follows:

§ 0.331 *Authority delegated.*

* * * * * * *

(b) * * *

(24) To act on requests for waivers of the requirements of Part 97 of this chapter when it is shown that such a waiver is required, taking into account the state of the radio art, to allow the operation of an amateur radio space station. Waivers will be limited to the following areas: station location, authorized emission, station control identification, logging, and operator privileges.

* * * * * * *

F.C.C. 73-331

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of INQUIRY INTO ALLEGED BROADCASTS AND CABLECASTS OF OBSCENE, INDECENT OR PROFANE MATERIAL BY LICENSEES, PERMITTEES OR CABLE SYSTEMS	Docket No. 19716

ORDER

(Adopted March 22, 1973; Released March 27, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER HOOKS ABSENT

1. The Commission has under consideration information and complaints from the public that certain broadcast licensees or permittees may have broadcast obscene, indecent or profane material in violation of Section 1464, Title 18 of the United States Code, which raises serious questions as to whether the licensees or permittees are operating in the public interest. Similar questions have arisen in connection with cablecasting.

2. THEREFORE, IT IS ORDERED, on the Commission's own motion, pursuant to Sections 403 and 409(e) of the Communications Act of 1934, as amended, that an inquiry is hereby instituted to determine whether any licensee, permittee or cable system, or any principal, agent or employee thereof, has engaged in the above-described practice, and if so to what extent and under what circumstances.

3. IT IS FURTHER ORDERED, That the inquiry shall be a nonpublic proceeding unless and until the Commission orders that public sessions be held after determining that the public interest would be served thereby. Such nonpublic proceedings are in accord with the Commission's practices in investigations of the nature indicated above.

4. IT IS FURTHER ORDERED, That, pursuant to Section 5(d)(1) of the Communications Act of 1934, as amended, for the purpose of this inquiry authority is hereby delegated to the Chief Administrative Law Judge of the Commission to require by subpoena the production of books, papers, correspondence, memoranda and other records deemed relevant to the inquiry; to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and to perform such other duties in connection therewith as may be necessary or appropriate to the compilation of a complete record concerning the subject matter of this inquiry.

5. IT IS FURTHER ORDERED, That the Chief Administrative Law Judge is specifically authorized to designate a Commission Administrative Law Judge to exercise the authority conferred by this Order; and to require witnesses to testify and produce evidence under authority of, and in the manner provided in, Section 409 of the Communications Act of 1934, as amended, when requested to do so by Commission Counsel.

6. IT IS FURTHER ORDERED, That the subpoena powers delegated by this Order shall be exercised in accordance with Sections 1.331 through 1.340 of the Commission's Rules. Motions to quash or limit subpoena shall be directed to the presiding Administrative Law Judge in accordance with Section 1.334 of the Rules. Applications for review of the presiding Administrative Law Judge's rulings on such motions may be filed with the Commission within ten (10) days after the issuance by the presiding Administrative Law Judge of such rulings.

7. IT IS FURTHER ORDERED, That the provisions of Section 1.27 of the Commission's Rules shall apply to the production of oral and documentary evidence under subpoena.

8. IT IS FURTHER ORDERED, That upon conclusion of the inquiry ordered herein, the presiding Administrative Law Judge shall certify the record thereof to the Commission for appropriate action.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-304

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF LARRY EDWARDS
and
RAY L. DANNER, D.B.A. DAE BROADCASTING CO., LICENSEE OF RADIO STATION WDVH, GAINESVILLE, FLA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1973; Released March 19, 1973)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability dated August 4, 1971, addressed to Larry Edwards and Ray L. Danner d/b/a DAE Broadcasting Company, licensee of Radio Station WDVH, Gainesville, Florida, and (2) licensee's response to the Notice of Apparent Liability dated September 2, 1971.

2. The Notice of Apparent Liability in this proceeding was issued because of the licensee's apparent violations of Section 1304, Title 18, U.S. Code, in that the licensee broadcast information relating to a lottery at least five times each day on March 21, 22, 23, 24, 25, 26, 29, 30 and 31, 1971.[1] The Notice indicated that the licensee was subject to apparent forfeiture liability in the amount of two thousand dollars ($2,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended.

3. In response to the Notice of Apparent Liability the licensee requests that the forfeiture be remitted or reduced. In support of its request, it states that the announcements in question were reviewed prior to broadcast by the station's general manager who determined, after checking with the advertiser and the advertising agency, that they did not relate to a lottery. Licensee states further that since acquiring the station it has "retained Washington communications counsel, has subscribed to pertinent trade press publications, has maintained in its studios current copies of the Commission's Rules and Regulations and has otherwise promulgated policies and procedures designed to preclude not only the broadcast of lotteries but the violation of any other regulation." Also, licensee asserts that since acquiring the station "no complaint or citation has been issued against it," that there was no intention to violate the statute, and that "short of making a third or fourth independent check of the acceptability of the promotion, it is

[1] There were a total of 62 broadcasts.

difficult to visualize just what else DAE could have done before accepting the Shaw and Keeter advertisement."

4. It appears that the following announcement was broadcast on the days mentioned above:

> **Shaw and Keeter has an extra bonus for you * * * A U.S. Savings Bond with every new car or truck delivered. At least a $25.00 bond. It might be a $50.00 bond. It could be a $500.00 bond. After purchase, check the sealed envelope in the glove box * * * with the sealed envelope in the office * * * It will be a $25.00 bond. It might be a $50.00 bond. It could be a $500.00 bond. Offer ends March 31st. Hurry to Shaw & Keeter Fordtown * * * Downtown.**

We find that all the elements of lottery were present in this promotion; a prize was offered in the form of a bond, consideration was necessary in that participants were required to make a purchase, and, since participants received bonds in varying amounts, chance was present.

5. As for mitigation, licensee cites its past good record, the fact that it had procedures to prevent lottery broadcasts and that licensee had made inquiry before accepting the promotion. Since licensees are responsible for compliance with Commission requirements, we are not persuaded to remit or mitigate the forfeiture because of "attempts to comply" which consisted of consulting the advertiser. In accordance with Section 503 of the Communications Act of 1934, as amended, any violation of Section 1304, Title 18, U.S. Code, subjects a licensee to liability, and thus we need make no determination as to whether the licensee intended to violate Section 1304. Considering all the circumstances in this case, including the licensee's past record, we are unable to find any persuasive reasons to remit or mitigate the forfeiture.

6. In view of the foregoing, IT IS ORDERED, That Larry Edwards and Ray L. Danner, d/b/a DAE Broadcasting Company, licensee of Radio Station WDVH, Gainesville, Florida, FORFEIT to the United States the sum of two thousand dollars ($2,000) for violation of Section 1304 of Title 18 of the U.S. Code. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the Order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of the receipt of this Memorandum Opinion and Order.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Larry Edwards and Ray L. Danner, d/b/a DAE Broadcasting Company, licensee of Radio Station WDVH, Gainesville, Florida.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-326

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of DAILY TELEGRAPH PRINTING CO. [WBTW (TV)], FLORENCE, S.C. For Construction Permit to Change Facilities	Docket No. 18650 File No. BPCT-4162

MEMORANDUM OPINION AND ORDER

(Adopted March 21, 1973; Released March 23, 1973)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; AND WILEY CONCURRING IN THE RESULT.

1. Before the Commission for consideration are: the Chief, Broadcast Bureau's August 4, 1972, application for review of the Decision of the Review Board herein 36 FCC 2d 4 (1972);[1] an application for review filed October 30, 1972, by Triangle Telecasters, Inc. seeking review of the Board's Decision, *supra*; and the Board's order, 37 FCC 2d 428 (1972), denying reconsideration of the Decision,[2] and related pleadings.

2. After hearings were held and evidence was adduced under a UHF impact issue specified in the designation order herein, the Administrative Law Judge issued an Initial Decision, 36 FCC 2d 24 (1970), recommending denial of the application of Daily Telegraph Printing Company for a construction permit to move and upgrade the transmitter-antenna facilities of television station WBTW[3] and thus to provide Grade B service for the first time to Cumberland County, North Carolina, which is a part of the Area of Dominant Influence of stations licensed in the Raleigh-Durham market. Triangle Telecasters, Inc. is licensed to operate Station WRDU-TV on Channel 28 at Durham, North Carolina, and has participated throughout this proceeding. Triangle contends that a grant of Daily Telegraph's application, which would provide an additional VHF Grade B signal over Cumberland County, North Carolina, within its Area of Dominant Influence, would not be in the public interest. The Review Board, for the reasons set forth in its Decision, 36 FCC 2d 4 (1972), concluded, however, that there is no reasonable likelihood that the proposed operation would have an adverse impact upon UHF development; that the

[1] Opposition to the Broadcast Bureau's application for review was filed by Daily Telegraph Printing Company on August 21, 1972, and a reply to opposition was filed by the Broadcast Bureau on August 31, 1972.

[2] The Broadcast Bureau filed a statement in support of Triangle's application for review on November 14, 1972. Daily Telegraph Printing Company filed an opposition to the application for review on November 14, 1972.

[3] WBTW is licensed on Channel 13 at Florence, South Carolina. The pertinent facts with regard to WBTW's present and proposed operation are fully set forth in the Board's Decision, *supra*, and need not be repeated here.

grant of the application will result in definite and significant benefits to the public and in the more efficient use of WBTW's facilities; and that the Commission's UHF protective policy and applicable precedent do not warrant the denial of the application under these circumstances. The Board therefore granted the application. Two factors were preeminent in the Board's resolution of the UHF impact issue, as follows. After the Initial Decision was issued but before the Board's consideration of exceptions, briefs, and oral argument on the matter, WRDU concluded an agreement with NBC for full network affiliation. Whereas in the past NBC programming had been available not only from WRDU but also from another Durham station with dual network affiliation, such programming is now available in the Raleigh-Durham market only from WRDU.[4] The Board stated that, presumably, with a full-time affiliation, WRDU will be in a better position to redress the competitive imbalance which has existed in the Raleigh-Durham market because audiences will have to rely solely upon WRDU for NBC programming. Secondly, the Board stated that the populations in Cumberland County—which would be served for the first time by WBTW if the instant application is granted—are not a potential audience for WRDU, even though the area constitutes a part of the Area of Dominant Influence of the Raleigh-Durham stations and WRDU places a Grade B signal there, because: WRDU has no off-the-air circulation in Cumberland County; it cannot claim a priority on the Fayetteville, North Carolina, Cable Television system; it meets same-network competition from the Wilmington, North Carolina, NBC affiliate in Fayetteville; and WBTW (a CBS affiliate) would merely intrude "one more signal into the web of established network competition." The Board, therefore, granted the WBTW application.

3. Board Member Kessler registered a vigorous dissent, stating, *inter alia*, that since WBTW would not provide a first local service to its city of license or would not serve substantial white or grey area populations, and since WRDU is not an established UHF station, the public benefits to be achieved by granting WBTW's application to expand service do not outweigh the likelihood of adverse impact upon UHF development. The applications for review in large measure rely upon arguments similar to those put forward by Miss Kessler in her dissenting opinion.

4. In its application for review, Triangle asserts, *inter alia*, that the Board's determinations were made on the basis of data which relates only to the early period immediately following WRDU's commencement of operation, during which period it had no full network affiliation, *i.e.*, part of 1968, 1969, and part of 1970, and that highly pertinent and more current data is available. Triangle does not, however, submit to the Commission the data upon which it would rely.

5. As the Review Board recognized, there is no question that the Commission's UHF protective policy is applicable to WRDU's operation. WRDU is a fledgling UHF station in a market otherwise dominated by VHF stations which has continuously sustained substantial

[4] However, a portion of the Area of Dominant Influence of the Raleigh-Durham television stations (including Fayetteville, North Carolina) receives a Grade A signal from the Wilmington, North Carolina, NBC affiliate, WECT.

losses since it commenced operation in 1968. Thus, before any further action is taken upon WBTW's application for improvement of facilities, we believe, as outlined below, that the Review Board should consider, initially, relevant data which has become available since the close of the record herein in 1970. In this way, the question of impact upon WRDU's operation from WBTW's proposal, whether minimal or otherwise, may be ascertained upon a more fully informed basis. At the same time, we believe that the Board should re-examine the question whether a grant of Daily Telegraph's application would impair the ability of any potential UHF television broadcast stations to compete effectively, noting as we do the availability of other allocated UHF channels in several communities in the area under consideration.

6. So that the Review Board may consider any relevant data which has become available since the close of the record herein,[5] we shall remand this proceeding to the Board for whatever further action it deems appropriate in the light of this Memorandum Opinion and Order, including the issuance of a Supplemental Decision. Whether the submission of any new, relevant data may lend itself to stipulation, we leave for the Board's initial determination. We leave for the Board to determine also to what degree the parties should be permitted to introduce rebuttal data and to address themselves to the significance which should be given to any new data and facts which may be adduced.

7. Accordingly, IT IS ORDERED:

(a) That this proceeding IS REMANDED to the Review Board for further consideration in accordance with this order and for issuance of a Supplemental Decision; and

(b) That the applications for review filed by the Broadcast Bureau on August 4, 1972, and by Triangle Telecasters, Inc. on October 30, 1972, ARE GRANTED to the extent indicated herein and ARE OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[5] For example, American Research Bureau Survey data for 1971, and later if available, as it relates to Fayetteville, North Carolina and Cumberland County, North Carolina, may have some significance. So, too, 1970 Census figures may have some meaning in the context of this proceeding. In the latter connection, however, we leave the matter of any use of such figures to the Board's judgment.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
HARRY BRITTON, HUSBAND LIBERATION MOVEMENT
Concerning Fairness Doctrine Re Stations
WTTG and WTOP–TV

MARCH 16, 1973.

MR. HARRY BRITTON,
810 5th Street NW.,
Washington, D.C. 20001

DEAR MR. BRITTON: This is in reference to your complaints against Television Stations WTTG and WTOP–TV, Washington, D.C. in which you allege that they failed to fulfill their fairness doctrine obligations when they presented various spokesmen for the Women's Liberation Movement and did not provide the Husband Liberation Movement a reasonable opportunity to express its opposing view.

In your correspondence you state that WTTG broadcast a thirty-minute interview with Women's Liberation Movement advocate Ms. Gloria Steinem, on July 2, 1972; that WTTG interviewed you for five minutes during a June 22, 1972 program but also presented on the same program a fifteen-minute interview with three women who all supported women's liberation; that WTOP–TV broadcast a thirty-minute program on June 22, 1972 featuring "two women libbers" and broadcast only a four-minute news report featuring you and the Husband Liberation Movement on July 6, 1972; that you requested additional broadcast time on the two stations to present ". . . the 'poor' husband's side that the women's place is in the home . . ."; that both stations refused your request for additional time; and that the Husband Liberation Movement has been covered in the national and international press and should be provided "a rebuttal to women's lib, which is a *controversial issue of public importance.*" You assert that you are President of the Husband Liberation Movement and that the movement has not had a chance over the media to explain its position that "the women's place is in the home"; that "the husband is the head of the house"; that women should not be drafted; and that working women have caused a shortage of jobs for men and an increase in the divorce rate.

The fairness doctrine requires a station which presents one side of a controversial issue of public importance to afford a reasonable opportunity for the presentation of contrasting views in its overall programming, which may include news programs, interviews, discussion, de-

bates, speeches and the like. The fairness doctrine does not require that "equal time" be afforded for each side, as would be the case if a political candidate appeared on the air during his campaign. Instead, the broadcast licensee has an affirmative duty to encourage and implement the broadcast of contrasting views in its overall programming which, of course, includes statements or actions reported on news programs. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station, since it is the right of the public to be informed which the fairness doctrine is designed to assure, rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith. For your further information, we are enclosing a copy of the Commission's Public Notice of July 1, 1964, entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance."

The Commission expects an individual who lodges a fairness doctrine complaint to submit specific information including: (1) the specific issue or issues of a controversial nature of public importance presented by the station; (2) the basis for the claim that the issue or issues were controversial issues of public importance, either nationally or in the station's local area at the time of the broadcast; (3) the basis for the claim that the station or network broadcast only one side of the issue or issues in its overall programming (complainant should include accurate summary of the view or views broadcast and presented by the station); and (4) whether the station or network has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue or issues. See *Allen C. Phelps*, 21 F.C.C. 2d 12, 13 (1969). In your complaints to the Commission you failed to indicate any basis for a conclusion that the station has not provided a reasonable opportunity for the presentation of contrasting views in its overall programming on the issue of Women's liberation. We note that both licensees provided you with an opportunity to present your views in opposition to the Women's Liberation Movement and from the information before the Commission the licensees cannot be said to have been unreasonable in refusing you further opportunities to present your views.

Regarding your contention that you and the Husband's Liberation Movement are the proper spokesmen to rebut the Women's Liberation Movement, generally, a licensee has discretion in determining the appropriate spokesmen for opposing viewpoints. In this connection we note that you have failed to demonstrate that the stations have not carried the views of other persons opposing the view of Women's Liberation, in addition to the time afforded you.

For the above reasons, your complaint is denied.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division,
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
PETER C. HERBST, JANET A. K. COOPER, AND
MICHAEL D. COOPER, CAPE ELIZABETH,
MAINE
Concerning Fairness Doctrine Re
Station WMTW-TV

MARCH 16, 1973.

MR. PETER C. HERBST,
2 Kenyon Lane,
Cape Elizabeth, Maine 04107

DEAR MR. HERBST: This refers to your complaint of February 1 and 16, 1973, against Station WMTW-TV filed on behalf of Janet A. K. Cooper, Michael D. Cooper and yourself regarding the broadcast of snowmobile commercials.

COMPLAINT

You allege that as residents of the State of Maine you participate in various outdoor winter sports and, therefore, are concerned about "the rampant growth and virtually unregulated use of snowmobiles in this and other New England states." You state that on January 10, 1973 you wrote station WMTW-TV indicating your concern over the broadcast of various snowmobile commercials that,

> * * * sought to promote the widespread use of snowmobiles in the State of Maine and in the greater New England area without reference to such vital public issues as the need to prevent damage to vegetation and wildlife, noise and air pollution, safety hazards to snowmobile users and others, violation of private property rights and abuse public land.

You state that the Maine legislature has conducted hearings on snowmobile regulation and that you requested station WMTW-TV to provide you with information relating to past programming "on the controversial issue" and inform you of "any plans that it had of rectifying this severe imbalance in its programming." You contend that the use of snowmobiles is of "broad public concern" and you refer to a study reported in *Consumer Reports* which covered three areas concerning snowmobiles, namely, (1) "the safety of the machines and their mode of use," (2) "the possible threat to the environment in the forms of plant and ground damage, threat to wildlife and vastly increased range of hunters, trappers and fisherman" and (3) "the need to protect the rights of property owners and others who are in the vicinity of snowmobiles as far as the problems of noise, trespassing, inadvertent property damage and deliberate vandalism are concerned." You also refer to a study entitled *Maine Snowmobile Owners* and to letters written to the editors of the *Portland Press Herald* and the

Maine Sunday Telegram which relate to the above mentioned areas of study. You contend that station WMTW–TV "not only has failed to present all views on the environmental controversy, but it has affirmatively misled the public and snowmobilers themselves."

You state that the fairness doctrine applies to the commercials because an imbalance in WMTW–TV's programming occurs when the commercials showing snowmobile ownership and use present the "good life" without any "conscious consideration of wildlife, vegetation, ecological balance, noise, or safety of others on public lands, or private lands where snowmobilers are illegally trespassing." You further state that because the public and the legislature of the State of Maine have been subjected to the influence of snowmobile manufacturers who promote the "unfettered use" of their product, it is necessary that the Commission act promptly. You also state that the current inquiry into the fairness doctrine (Docket No. 19260, 30 FCC 26 (1971)) is irrelevant to the necessity for a decision in your particular situation. You request that the Commission order station WMTW–TV to comply with the fairness doctrine in light of its "public interest obligation arising out of its programming of snowmobile advertisements which seek to influence the public by presenting only one side of a controversial issue of public importance." In addition you request that the Commission order station WMTW–TV to pay you for your costs "in this matter and possible expenses for attorneys fees which might later be incurred."

In its reply to your January 10 letter, Station WMTW–TV stated (1) that it was its view that the commercials did not raise a fairness doctrine obligation and did not advocate a misuse of the product and (2) that, realizing there was legislation pending dealing with snowmobile regulation, it invited you to participate with other diverse spokesmen on a discussion program concerning snowmobiles. However, you allege in your second letter to the Commission on February 16, 1973, that you declined to participate because you were not seeking ". . . time for ourselves and since the station claims to be inviting various groups which will discuss, we hope, many of our concerns." In addition, you state that the station's response to your letter was an implicit refusal to ". . . supply us with the information which we desired about the ads; that, as a result, WMTW–TV is preventing a resolution of the issues you have raised; has made it necessary for you to contact the Commission "to solve essentially community problems of great import at the community level"; and that WMTW–TV has "flagrantly violated its mandate to operate in the public interest by exhibiting a visible lack of good faith in this matter." You further state that station WMTW–TV has not denied your description of the snowmobile commercials, but "only contests an issue of law: whether the ads present one side of a controversial issue of public importance." You also allege that because WMTW–TV failed to deny your assertion that approximately "400 spots" were broadcast, you believe that your estimate is low. Thus, you request that the Commission not only fine WMTW–TV one thousand dollars for not providing the information you asked for, but also require that the information now be furnished to you. You further request that

WMTW–TV be fined $100 for each day the information is not provided. You regard the one-hour discussion program as inadequate when compared to "200 minutes of spots over a five month period during heavily viewed times * * *" You reiterate your request for immediate relief and you request that the Commission "order" WMTW–TV indicate what it intends to do in the way of correcting the imbalance in its overall programming.

DISCUSSION

The fairness doctrine provides that if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. The fairness doctrine does not require "equal time" be afforded each side but does require the licensee to afford reasonable opportunity for presentation of contrasting views in its overall programming, which includes news, discussion, interview programs, etc. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

First, we note that you have not provided the Commission with any information which indicates that the licensee in its *overall* programming has failed to present contrasting views on the subject of snowmobiles. Although you request that the Commission "order" the licensee furnish information concerning timing, frequency, duration, complete texts, etc. of the snowmobile commercials, we do not require licensees to furnish material absent some such showing. Thus, a complainant must "(a) specify the particular broadcast in which the controversial issue was broadcast, (b) state the position advocated in such broadcasts, and (c) set forth reasonable grounds for concluding that the licensee in its overall programming has not attempted to present opposing views on the issues." *Allen C. Phelps*, 21 F.C.C. 12 (1970), cf. *Democratic National Committee et al.* v. *F.C.C.*, —— U.S. App. D.C. ——, 460 F. 2d 891 (1972).

Turning to the question whether the advertisements discussed a controversial issue of public importance, it would appear from your complaint that the snowmobile commercials do nothing more than advance a claim for product efficacy or social utility. Since they thus do not deal explicitly with one side of a controversial issue (See *Wilderness Society et al.* (Esso) 31 F.C.C. 2d, 29 (1971)), the issue is squarely the application of the fairness doctrine to ordinary product commercials. Although you have concluded that it is irrelevant to the necessity for a Commission decision in the instant case, this issue is in fact under consideration in Section III of the Commission's current inquiry into the fairness doctrine (Docket No. 19260, 30 F.C.C. 26 (1971)).

While our definitive ruling will issue in the docket, we must rule in this case on the basis of past precedents and what we deem to be common sense of the matter.

On this basis, we decline to apply the fairness doctrine to these ordinary product commercials. A contrary course would extend the applicability of the doctrine to virtually all products—e.g., beer, airplanes, cigars, detergents; would be chaotic and administratively a horror and indeed might even undermine the economic base of the broadcasting industry and thus its ability to serve the needs and interests of the listening public—a matter which we leave for final resolution to Docket No. 19260; and would not truly or effectively illumine the "issue of great public concern" as to which the broadcaster is obligated to devote a reasonable amount of time (*Red Lion Broadcasting Co.* v. *F.C.C.* 395 U.S. 367 (1969)). We do not read the *Friends of the Earth* case as requiring an extension of the fairness doctrine to virtually all ordinary product commercials; rather, the Court's holding there is limited to the particular advertisements and public health issues involved, and is expressly stated to be on the grounds that pending the outcome of an overall inquiry, the health hazard issue in *Cigarette Advertising* ruling cannot be distinguished from that in *Friends of the Earth*. You have presented no such indistinguishable public health hazard issue.

Accordingly, we conclude that the licensee has acted reasonably and in good faith in determining that the advertisements did not constitute a discussion of one side of a controversial issue of public importance.

In view of the foregoing, no further Commission action is warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
HUDSON-MOHAWK GROUP, LATHAM, N.Y.
Concerning Fairness Doctrine Re Station
WRG–TV

MARCH 16, 1973.

Mr. PAUL M. BRAY,
Mountain View Terrace,
Building 10, Apartment 17,
Latham, N.Y. 12110

DEAR MR. BRAY: This refers to your complaint of February 28, 1972, against Station WRGB–TV filed on behalf of the Hudson-Mohawk Group of the Sierra Club-Atlantic Chapter and Mr. Michael Dew regarding the broadcast of snowmobile advertisements.

COMPLAINT

You alleged that WRGB–TV, Schnectady, New York, has broadcast one side of a controversial issue,

> * * * by the frequent presentation of spot advertisements for snowmobiles, which are generally described as safe, clean, quiet, socially desirable, responsible, good family fun, and a way to enjoy the peace and beauty of nature's winter wonderland.

You state that Michael Dew, as chairman of the conservation committee of the Hudson-Mohawk Group of the Sierra Club, sent a letter to the program director of WRGB–TV expressing concern, ". . . over the frequency and content of the snowmobile commercials which have been broadcast by your station, and the apparent lack of presentation time afforded for the social and environmental problems created by the use of snowmobiles in our area", and that in response WRGB–TV stated that it did not believe the snowmobile commercials raised a controversial issue of public importance in the viewing area of the station. However, you contend that snowmobile commercials invoke the fairness doctrine and WRGB–TV "has failed to meet its public interest obligations." You further state that over 100 inches of snow may fall during the winter in your area; that the present number of snowmobiles is estimated at 180,000, with the projection that the figure will more than double in the next few years; that the noise level from snowmobiles may exceed 85 decibels, which may damage human ears as well as the hearing of wild animals; that snowmobiles have damaged vegetation and woodlands; that farmers can lose their crops when the compacted snow prevents the supply of oxygen to the earth; and that because of the mobility of snowmobiles, private property and

109-033—73——2

farm property are threatened. You also mention the problem of trespassing and vandalism.

In addition, you state that even though the state of New York appropriated $150,000, for the enforcement of snowmobile laws, only 67 arrests were made in 1971, which indicates the difficulty involved with law enforcement; that snowmobiles can be a dangerous machine in light of collisions that may occur with automobiles, trees and fences; that because some snowmobiles are not stable, while becoming more powerful, hazards continue to increase; that state owned property is being used for snowmobiling which some people consider an unconstitutional use; that snowmobile announcements which do not present the actual sound of the snowmobile while depicting a "way to enjoy the peace and beauty of nature's winter wonderland", present a "deceptive image" and a "one sided" view of a controversial issue; that these same commercials fail to show the effect of snowmobiles on wildlife, vegetation, forests, and people who do not participate in the sport, but at the same time "want to enjoy nature's beauty"; that many snowmobile commercials emphasize power and strength, which you consider to be an issue similar to the one raised in *Friends of the Earth* v. *FCC*, 146 U.S. App. D.C. 88, 449 F.2d 1164 (1971), namely, the purchase of high powered cars; that contrary to what the snowmobile commercials advocate, "added power is not needed for what is basically only a recreational vehicle," and ". . . the greater the power, the greater the resulting danger and nuisance from their use"; that the Commission has applied the fairness doctrine to the broadcast of paid product commercials in *Banzhaf* v. *FCC*, 405 F.2d 1082 (1968), and *Friends of the Earth* v. *FCC supra;* and that "general commercial advertisements by a store involved in a labor dispute could implicitly, as well as explicitly, raise a controversial issue of public importance," citing *Retail Store Employees Local 880* v. *FCC*, 141 U.S. App. D.C. 94, 436 F.2d 248 (1971).

You contend that because of the impact snowmobiles will have on the future quality of the environment in the northeast, the Commission should apply the fairness doctrine to snowmobile commercials in light of the National Environmental Policy Act of 1969 (NEPA) in which Congress "emphasized the critical importance of restoring and maintaining environmental quality." You also state that Congress has directed governmental agencies to advance these ends by administering "the policies, regulations, and public laws of the United States . . . in accordance with the policies set forth in this Act." You contend that WRGB–TV is free to make a profit from snowmobiles "by virtue of its license, but it also has a duty to serve the public interest on the question of snowmobiles by presenting all sides of the issue." The relief you request is permission to present a "two-minute equally dramatic presentation describing the problems raised by snowmobiling in (your) area." In addition, you request that the Commission rule that snowmobile commercials "invoke provisions of the fairness doctrine, and require WRGB–TV to devote a suitable amount of time, in a format of comparable repetition, force and intensity, to opposing points of view."

Response by Licensee

General Electric Broadcasting Co., (GEBCO), the licensee of WRGB–TV, states that your position appears to be that any snowmobile commercial not only inherently invokes the fairness doctrine, but also represents a discussion of one side of a controversial issue. GEBCO also contends that the precise issue is, "whether WRGB–TV has any fairness doctrine obligation specifically arising out of the carriage of snowmobile commercials? or, whether the broadcast of snowmobile commercials automatically can be considered to represent the discussion of one side of a controversial issue." GEBCO states that no controversial issue of public importance is raised by the commercials and your complaint merely asserts that snowmobiling, as presented in the commercials, fails to demonstrate either the negative aspects which might be inferred from the use of the product or the assumed recreational alternatives. GEBCO also states that an *ad hoc* determination is inappropriate for consideration of whether product commercials inferentially raise a controversial discussion; that a chaotic situation would develop if broadcasters were required to anticipate inferences, since inferences are subjective and vary from one person to another; and that "the Commission has itself acknowledged that on such issues as ecology, people can *infer* adverse consequences from the mere presentation of commercials for such products and services as detergents and soaps, disposable containers, toothpaste products with fluoride, food products with chemical additives, etc., see e.g., *Fairness Doctrine Ruling on Chevron Gasoline Commercials*, 29 FCC 2d 807, 811–812 (1971)."

In addition, GEBCO declares that the question of the fairness doctrine and its applicability to commercial content is presently being considered in the Commission's fairness doctrine inquiry (See *Notice of Inquiry*, 30 FCC 2d 26 (1971)); that the issue contained in your complaint comes within the purview of the inquiry; and that the comments it has filed with the Commission stated that commercials which merely solicit the purchase of a product "are simply not covered by the fairness doctrine."

Your Reply to Licensee's Response

You state that the licensee concedes that the use of snowmobiles "may engender a controversial issue of public importance." However, you contend that the licensee has failed to acknowledge any "responsibility to give coverage to this issue or to set forth any information on how it has actually treated the issue." You also restate the belief that snowmobiles are a controversial issue of public importance in the WRGB–TV area; and that not only has harm resulted to the environment, but personal safety has been endangered. You further state that WRGB–TV has not met its responsibility; that another station in the listening area has produced a "mini-documentary" which has been broadcast; and that that station has provided time for the discussion of the snowmobile issue in its local programming. You allege that a distinction can be made between commercials that suggest the purchase of one brand of snowmobile over another and those that show the snow-

mobile as a "safe, socially desirable way for families to enjoy the outdoors together." You contend that "interested parties" should have the same right to answer commercials in the second category as they would have to answer a WRGB–TV editorial covering the snowmobile issue.

You also state that the snowmobile commercials broadcast over WRGB–TV have led to a great increase in snowmobile sales in the area "at a time when many individuals and groups were concerned about the impact of snowmobiles"; and that because you do not have access to the particular commercial transcripts to which you refer, you hope the Commission will examine the transcripts. Contrary to the position stated by GEBCO, you allege that there is a "direct relationship between the message broadcast in the commercials and the controversial issue of snowmobiles under discussion in your community." You contend that your request does not ask for an extension of the fairness doctrine, but that WRGB–TV has not served the public interest of the community by broadcasting commercials that "stimulate snowmobile sales without giving adequate coverage to the resulting problems and dangers."

Discussion

The fairness doctrine provides that if a station presents one side of a controversial issue of public importance, it is required to afford reasonable opportunity for the presentation of contrasting views. The fairness doctrine does not require "equal time" be afforded each side but does require the licensee to present contrasting views in its overall programming, which, of course, includes statements or actions reported on the news. Thus, both sides need not be given in a single broadcast or series of broadcasts, and no particular person or group is entitled to appear on the station since it is the right of the public to be informed which the fairness doctrine is designed to assure rather than the right of any individual to broadcast his views. It is the responsibility of the broadcast licensee to determine whether a controversial issue of public importance has been presented and, if so, how best to present contrasting views on the issue. The Commission will review complaints to determine whether the licensee can be said to have acted reasonably and in good faith.

First, we note that in any event you have not provided the Commission with any information which indicates that the licensee in its *overall* programming has failed to present contrasting views on the subject of snowmobiles. Although you request that the Commission obtain transcripts of the commercials, we do not require licensees to furnish material absent some such showing. Thus, a complainant must "(a) specify the particular broadcast in which the controversial issue was broadcast, (b) state the position advocated in such broadcasts, and (c) set forth reasonable grounds for concluding that the licensee in its overall programming has not attempted to present opposing views on the issues." *Allen C. Phelps*, 21 F.C.C. 12 (1970), cf. *Democratic National Committee et al* v. *F.C.C.*, — U.S. App. D.C. — 460 F. 2d 891 (1972).

Turning to the question whether the advertisements discussed a controversial issue of public importance, it would appear from your complaint that the snowmobile commercials do nothing more than advance a claim for product efficacy or social utility. Since they thus do not deal explicitly with one side of a controversial issue (See *Wilderness Society et al* (Esso) 31 F.C.C. 2d 729 (1971)), the matter here is squarely the application of the fairness doctrine to the ordinary product commercial. This matter is now under consideration in Section III of the Commission's current inquiry into the fairness doctrine (Docket No. 19260, 30 F.C.C. 26 (1971)). While our definitive ruling will issue in the docket, we must rule in this case on the basis of past precedents and what we deem to be common sense of the matter.

On this basis, we decline to apply the fairness doctrine to these ordinary product commercials. A contrary course would extend the applicability of the doctrine to virtually all products—e.g., beer, airplanes, cigars, detergents; would be chaotic and administratively a horror and indeed might even undermine the economic base of the broadcasting industry and thus its ability to serve the needs and interests of the listening public—a matter which we leave for final resolution to Docket No. 19260; and would not truly or effectively illumine the "issue o f great public concern" as to which the broadcaster is obligated to devote a reasonable amount of time (*Red Lion Broadcasting Co.* v. *F.C.C.* 395 U.S. 367 (1969)). We do not read the *Friends of Earth* case as requiring an extension of the fairness doctrine to virtually all ordinary product commercials; rather, the Court's holding there is limited to the particular advertisements and public health issues involved, and is expressly stated to be on the grounds that pending the outcome of an overall inquiry, the health hazard issue in *Cigarette Advertising* ruling cannot be distinguished from that in *Friends of the Earth*. You have presented no such indistinguishable public health hazard issue.

Accordingly, we conclude that the licensee has acted reasonably and in good faith in determining that the advertisements did not constitute a discussion of one side of a controversial issue of public importance.

In view of the foregoing, no further Commission action is warranted at this time.

Staff action is taken here under delegated authority. Application for review by the full Commission may be requested within 30 days by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

Sincerely yours,

WILLIAM B. RAY, *Chief,*
Complaints and Compliance Division
for Chief, Broadcast Bureau.

F.C.C. 73-325

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF HOMELAND ENTERPRISES, INC., LICENSEE OF RADIO STATION KAOL, CARROLLTON, MO.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted March 21, 1973; Released March 27, 1973)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability dated November 3, 1971, addressed to Homeland Enterprises, Incorporated, licensee of Radio Station KAOL, Carrollton, Missouri, and (2) licensee's response, dated December 7, 1971, to the Notice of Apparent Liability.

2. The Notice of Apparent Liability for forfeiture in the amount of five hundred dollars ($500) in this proceeding indicated that the licensee violated Section 73.93 [1] of the Commission's Rules, in that the station was operated without an operator constantly on duty at the transmitter from November 10, 1970 to November 18, 1970, during which period the remote control equipment was inoperative.

3. In response to the Notice of Apparent Liability, licensee states:

> In our previous correspondence to you, dated June 24, 1971, we stated that no operator stayed at the transmitter because there are no adequate heat and plumbing facilities at the transmitter site. It did not seem reasonable to the owners of KAOL that since the transmitter would be operated by remote control, that heating and plumbing facilities would be necessary.
>
> It appears that we had one of two choices. Either operating as we did or ceasing operation completely and we did not find anything in the Commission's rules that stated that the only alternative of Section 73.93 was to cease operation. We certainly do not deny that we violated Section 73.93, but we do emphatically deny that we *willfully* failed to observe the best engineering procedures available to us under the existing emergency. * * *
>
> We believe we have proven that we did not *willfully* violate Section 73.93. And we do not believe it would serve the cause of justice to penalize us $500 for something that we could not help.

[1] At the time of the violations in question, Section 73.93 provided in pertinent part as follows:

"(a) One or more radio operators holding a valid radiotelephone first-class operator license, except as provided in paragraph (b) of this section, shall be in actual charge of the transmitting apparatus and shall be on duty either at the transmitter location or remote control point. If operation by remote control has not been authorized, the transmitter shall be readily accessible and clearly visible to the operator at his normal operating position. If operation by remote control is authorized, the control and monitoring equipment shall be readily accessible and clearly visible to the operator at his normal operating position."

4. Section 73.67(a)(3) of the Commission's Rules states:

> (3) A malfunction of any part of the remote control equipment and associated line circuits resulting in improper control or inaccurate meter readings shall be cause for the immediate cessation of operation by remote control.

As indicated above, Section 73.93(a) of the Commission's Rules requires that a properly licensed operator be on duty at the transmitter at all times during operations, if operation by remote control has ceased. Therefore, it appears that licensee repeatedly violated Section 73.93 of the Commission's Rules from November 10, 1970 to November 18, 1970. Having determined that the violation was repeated, it is unnecessary that we make a determination as to the willfulness of the violations. *Paul A. Stewart*, FCC 63–411, 25 RR 375. We have considered licensee's response and the circumstances of this case and we are not persuaded to rescind or reduce the forfeiture.

5. In view of the foregoing, IT IS ORDERED, That Homeland Enterprises, Incorporated, licensee of Radio Station KAOL, Carrollton, Missouri, FORFEIT to the United States the sum of five hundred dollars ($500) for repeated failure to observe the provisions of Section 73.93 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Homeland Enterprises, Incorporated, licensee of Radio Station KAOL, Carrollton, Missouri.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-308

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of GEORGE T. HERNREICH, TRADING AS KFPW BROADCASTING CO. (KFPW-TV), FORT SMITH, ARK. For License to Cover Construction Permit	Docket No. 19291 File No. BLCT-2093
GEORGE T. HERNREICH (KAIT-TV), JONESBORO, ARK. For Renewal of License	Docket No. 19292 File No. BRCT-623

ORDER

(Adopted March 13, 1973; Released March 21, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER WILEY NOT PARTICIPATING.

1. The Commission has before it for consideration: (a) an application for review of an interlocutory Memorandum Opinion and Order of the Review Board in the above captioned proceeding, FCC 72R-4, 33 FCC 2d 313, released January 12, 1972, filed by George T. Hernreich on January 19, 1972; (b) an opposition to the application for review filed by the Chief, Broadcast Bureau, on January 31, 1972; and (c) a reply to the opposition filed by George T. Hernreich on February 10, 1972.

2. This matter arises out of Hernreich's request to the Review Board to enlarge the issues of this proceeding to allow a showing of the broadcast record and public service benefits of his radio and television stations. In its ruling, the Board added an issue which would permit Hernreich to show the broadcast record of Station KAIT-TV, Jonesboro, Arkansas, but denied his request in all other respects. While this hearing involves charges both of bribery of network officials and of misrepresentations to the Commission, the Board held that the mitigating effect of any meritorious programming would be restricted to the bribery issue, since such a record would be of no decisional significance if it is found that Hernreich has made willful misrepresentations to the Commission. Hernreich now seeks review of the Board's action, urging that it is erroneous in several respects.

3. In its opposition, the Bureau states, *inter alia*, that it continues to adhere to its position before the Review Board that it would be inappropriate to add such an issue which would look toward mitigation

of the effects of either of the two character issues specified in this proceeding. In the Bureau's view, the evidence Hernreich might introduce would have no relevance or materiality in the ultimate resolution of this case and would only serve to delay and complicate the hearing, since the issues directly concern the personal integrity of the licensee. In considering the Bureau's position, it must be noted that similar issues have often been added in other proceedings and that support can be found for Hernreich's request in cases such as *Washington Broadcasting Co.*, 3 FCC 2d 777 (1966). In the latter case, although we held that the applicant would be allowed to make the requested showing, we pointed out that we are not required to consider such evidence and that no judgment was being made as to the weight, if any, which would be given to it.

4. After careful consideration, we are now convinced that the weight which could be given to such a showing would be so minimal in a case involving the type of issues specified here that no useful purpose would be served by adding a meritorious programming issue. It is clear that we need not consider the public service rendered by a station where the licensee is found to have made willful misrepresentations to the Commission. See *Immaculate Conception Church of Los Angeles* v. *F.C.C.*, 116 U.S. App. D.C. 73, 320 F. 2d 795, 25 RR 2128a, *cert. denied*, 375 U.S. 904 (1963). By the same token, we believe that bribery of network officials or any other acts involving moral turpitude relating directly to the operation of a broadcast station would be sufficiently analogous to the misrepresentation situation to warrant similar treatment if proven. Once an applicant is shown to be untrustworthy due to evidence reflecting adversely on his personal integrity, a grant would simply not be appropriate no matter how meritorious his past programming had been.

5. Thus, in this case, should Hernreich be found to be untrustworthy either because he bribed a network official or because he made willful misrepresentations [1] to the Commission in its investigation of that incident, the adverse evidence concerning his basic qualifications would be so compelling that there would be no reason to consider the merit of his stations' programming. On the other hand, if he is absolved of the alleged misconduct, the hearing would be resolved in his favor without any consideration of his broadcast record. Thus, in either event, any inquiry into Hernreich's past programming would serve no useful purpose and would only delay the ultimate resolution of this proceeding. For these reasons, we have concluded that Hernreich's application for review should be denied, that the Board's order should be set aside, and that Hernreich's request for an issue to show the broadcast record and public service benefits of his stations should be denied in all respects.

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[1] Although Hernreich argues that the misrepresentation issue might encompass conduct which could be described as innocent or negligent misrepresentations and that a showing in mitigation would be appropriate as to such conduct, the issue in this proceeding is intended to apply only to willful misrepresentations.

6. Accordingly, IT IS ORDERED That the application for review, filed January 19, 1972, by George T. Hernreich IS DENIED.

7. IT IS FURTHER ORDERED That the Review Board's Memorandum Opinion and Order of January 12, 1972, FCC 72R–4, IS SET ASIDE.

8. IT IS FURTHER ORDERED That the Petition to Enlarge Issues filed by George T. Hernreich on August 19, 1971, IS DENIED in all respects.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-292

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re LEACOM, INC., BUENA VISTA, COLO. For Certificate of Compliance	CAC-1421 C0059

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1973; Released March 22, 1973)

BY THE COMMISSION:

1. On October 18, 1972, Leacom, Inc., filed an application (CAC-1421) for a certificate of compliance to begin cable television service at Buena Vista, Colorado, a community of approximately 8,500 persons located outside all television markets. There is no opposition to this application.

2. Only one issue requires our disposition: is the term of this franchise reasonable? The Buena Vista City Council significantly amended the franchise on October 10, 1972, and the applicant submits that the franchise now fully complies with Section 76.31 of the Commission's Rules. The initial duration of the franchise is fifteen years, with the franchisee having an unqualified option to renew for another five years.[1]

In short, it appears that, in effect, a twenty-year franchise has been awarded. Section 76.31(a)(3) of the Rules provides that "the initial franchise period shall not exceed fifteen (15) years, . . ." We do not believe an automatic renewal such as is here proposed is consistent with the quoted rule since there is no provision for a review of the applicant's qualifications or performance until the renewal term expires. Accordingly, we will deny the present proposal without prejudice to the refiling of a proposal consistent with this opinion. Compare *Sapulpa Cable Television*, FCC 72-1106, 38 FCC 2d 584, *reconsideration granted*. FCC 73-279, — FCC 2d —.

In view of the foregoing, the Commission finds that a grant of the above-captioned application would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the application for certificate of compliance (CAC-1421) filed by Leacom, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

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[1] Article IV, Section 1 of the Ordinance provides as follows:
"*Section 1.* This Ordinance shall become effective, as provided by law, thirty days after its publication following final passage, upon acceptance in writing by the Company within said period, and the terms, conditions and covenants thereof shall remain in full force and effect for a period of fifteen years from and after said effective date. Provided further that the Company shall have the option of extending the terms of this Ordinance for an additional period of five years which may be excercised [sic] by notice in writing to the Town given not later than six months before the expiration of the Ordinance."

F.C.C. 73-301

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF LOWER COLUMBIA BROADCASTING CO., LICENSEE OF RADIO STATION KVAS, ASTORIA, OREG.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1973; Released March 19, 1973)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability dated October 28, 1971, addressed to Lower Columbia Broadcasting Company, licensee of Radio Station KVAS, Astoria, Oregon and (2) licensee's response to the Notice of Apparent Liability dated November 12, 1971.

2. The Notice of Apparent Liability for five hundred dollars (500) was issued for apparent willful or repeated violation of Sections 73.93 and 73.113 of the Commission's Rules and Section 318 of the Communications Act of 1934, as amended, in that the station was operated by an employee who had no license or permit for broadcast purposes, and who signed the operating logs on 42 days as follows:

December:		January:	
5, 1970	1900–2403 PST	2, 1971	1300–2401 PST
6, 1970	1600–2120 PST	3, 1971	1600–2001 PST
8, 1970	1800–2202 PST	5, 1971	1800–2202 PST
9, 1970	1800–2204 PST	6, 1971	1800–2203 PST
12, 1970	1300–1800 PST	9, 1971	1300–2402 PST
13, 1970	1600–2001 PST	10, 1971	1600–2001 PST
15, 1970	1800–2225 PST	12, 1971	1800–2203 PST
16, 1970	1800–2200 PST	13, 1971	1800–2205 PST
19, 1970	1300–1800 PST	16, 1971	1300–2402 PST
20, 1970	1600–2201 PST	17, 1971	1600–2001 PST
22, 1970	1800–2203 PST	19, 1971	1800–2203 PST
23, 1970	1800–2202 PST	20, 1971	1800–2203 PST
25, 1970	1200–1630 PST	23, 1971	1300–2404 PST
26, 1970	1300–1800 PST	24, 1971	1600–2001 PST
27, 1970	1600–2121 PST	26, 1971	1800–2203 PST
30, 1970	1800–2204 PST	28, 1971	1800–2204 PST
		30, 1971	1800–2202 PST

February:		February:	
2, 1971	1800–2346 PST	10, 1971	1800–2204 PST
3, 1971	1800–2204 PST	13, 1971	1300–2403 PST
6, 1971	1800–2403 PST	20, 1971	1300–2203 PST
7, 1971	1830–2119 PST	21, 1971	1200–1330 PST
9, 1971	1800–2203 PST		

3. In response to the Notice of Apparent Liability the licensee admits that the employee, without any license or permit for broadcast purposes, operated the station (i.e., the transmitter) and signed the operating logs on the 42 days above-mentioned. The licensee further states that under the supervision of the general manager the employee was a satisfactory operator and that, immediately upon management's becoming aware of the fact that the employee was not licensed, the employee was dismissed. Licensee asserts that by reason of the immediate dismissal of the employee the violation was not willful and did not occur repeatedly. As we have stated previously "repeatedly means simply *more than once*" and there is no need to become involved in any question of activities subsequent to warning or notice. *Friendly Broadcasting Company*, FCC 62–670, 23 RR 893. Moreover, a licensee will not be excused for past violations because of subsequent corrective action. *Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966). We find that the violations occurred repeatedly and that it is not necessary to make an additional finding as to willfulness. *Paul A. Stewart*, FCC 63–411, 25 RR 375. We have considered the licensee's response and the circumstances of this case and are not persuaded to remit or mitigate the forfeiture.

4. In view of the foregoing, IT IS ORDERED, That Lower Columbia Broadcasting Company, licensee of Radio Station KVAS, Astoria, Oregon FORFEIT to the United States the sum of five hundred dollars ($500) for repeated violation of Sections 73.93 and 73.113 of the Commission's Rules and Section 318 of the Communications Act of 1934, as amended. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended and Section 1.621 of the Commission's Rules, an application for remission or mitigation of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Lower Columbia Broadcasting Company, licensee of Radio Station KVAS, Astoria, Oregon.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 73-297

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CLAYTON W. MAPOLES, TRADING AS MILTON BROADCASTING CO. For renewal of license of Station WEBY, Milton, Fla.	Docket No. 17613 File No. BR-2983

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1973; Released March 21, 1973)

BY THE COMMISSION:

1. The Commission has for consideration a motion for stay of the effective date of the Commission's order contained in its decision denying an application for the renewal of the license of station WEBY, Milton, Florida. In denying the application for renewal, the Commission ordered that, if the applicant seeks judicial review of the Commission's decision, he is authorized to continue to operate station WEBY until thirty days after the final disposition of the appeal. *Clayton W. Mapoles tr/as Milton Broadcasting Company*, 34 FCC 2d 1036, 24 RR 2d 369 (1972). The applicant did seek judicial review of the Commission's decision, and the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's decision by its judgment handed down on January 30, 1973. *Clayton W. Mapoles tr/as Milton Broadcasting Company* v. *Federal Communications Commission*, Case No. 72-1583. The court's mandate was issued on February 28, 1973, and, unless the motion for stay is granted, station WEBY must cease operation at the close of the WEBY broadcast day on March 30, 1973.

2. Clayton W. Mapoles tr/as Milton Broadcasting Company (petitioner) requests that the Commission's decision be stayed and that he be authorized to continue to operate WEBY until either a new applicant or an interim group is authorized to operate the station. He states that he understands that two or three applicants are interesed in applying for the facility, and that if he is not authorized to continue operation of the station, the citizens of Milton and nearby communities will be deprived of the service, which he described as vital, while hearings on proposals of prospective applicants are held. He represents that he has the facilities and the willingness to serve during the interim period and that his operation would in no way prejudice the rights of any prospective applicants.

3. The Commission does not find the arguments persuasive and, therefore, his motion for stay will be denied. Even without the WEBY

service there will remain two aural services, WXBM–FM and WSRA (AM), licensed to Milton. The residents of Milton will also continue to receive at least two principal city aural signals from WMEZ–FM and WBOP–FM, in Pensacola, Florida. The petitioner has not shown that the termination of the operation of WEBY would result in irreparable injury either to himself or to members of the public. Under the circumstances the Commission cannot find that continued operation of WEBY by the petitioner should be authorized in view of its previous determination that the WEBY license should not be renewed, and the Court's affirmance of that decision.

4. Accordingly, IT IS ORDERED, That the motion for stay filed by Clayton W. Mapoles tr/as Milton Broadcasting Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
NATIONAL CABLE TELEVISION ASSOCIATION
To Examine Commission Documents

MARCH 16, 1973.

MR. DAVID FOSTER, *President,*
National Cable Television Association, Inc.,
918 16th Street NW.,
Washington, D.C. 20006

DEAR MR. FOSTER: This is in reply to a letter of February 23, 1973 from your counsel wherein the National Cable Television Association, Inc. requests authorization under the Freedom of Information Act, 5 U.S.C. § 552, and under Section 0.461(a) of the rules, 47 CFR § 0.461(a), to examine:

1. The Report of Harbridge House, Inc. done for the Federal Communications Commission under contract RC 10914, which studied and recommended proposed requirements for staffing the Commission's Cable Television Bureau in view of the Commission's increased regulation of CATV.
2. The Federal Communications Commission's Budget Estimates for Fiscal Year 1974 submitted to the Congress.

As you know, the above documents are not listed in Sections 0.453 and 0.455 of the rules as records that are routinely available for public inspection, and they are normally not otherwise available for inspection under our rules as coming within Sections (b)(2)(5) of the Freedom of Information Act, 5 U.S.C. §§ 552(b)(2)(5), unless a persuasive showing as to the reasons for inspection is made by the person requesting the documents.

Initially it should be noted that the study of the Cable Television Bureau undertaken by Harbridge House, Inc. for the Commission under contract RC 10914 is essentially a management study prepared by the contractor for internal Commission use. The Final Report prepared by Harbridge House has not been submitted to the Commission for approval and the contractor prepared a preliminary staffing study with the understanding that it would be modified as subsequent data were developed. Thus in view of the current status of the study, I believe it should not be disclosed at this time.

With respect to your request for the FY 1974 Budget Estimates submitted by the Commission to the Congress, these documents were prepared for the use of the appropriations committees of the Congress and we therefore consider them to be the property of Congress. These estimates constitute intra-governmental documents and pursuant to Section 0.461(c)(2) of the rules, we have apprised the appropriate committee of your request and have been advised that these documents

should not be made available until after its hearings are completed and copies of the testimony have been released.

In view of the foregoing, I do not believe it would be advisable to grant your request for (1) the Harbridge House, Inc. Report studying and recommending staffing proposals for the Commission's Cable Television Bureau and for (2) the Budget Estimates for Fiscal Year 1974 submitted by the Commission to the Congress. Review of my ruling may be sought pursuant to the procedures specified in Section 0.461 (d) (1) of the rules.

Sincerely yours,

JOHN M. TORBET,
Executive Director.

109-033—73——3

F.C.C. 73-230

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
"CLIPPING" OF RADIO AND TELEVISION NETWORK PROGRAMS

MARCH 2, 1973.

The Commission by Commissioners Burch (Chairman), Robert E. Lee, Johnson, H. Rex Lee, Reid, Wiley and Hooks, issued the following PUBLIC NOTICE:

"CLIPPING" OF RADIO AND TELEVISION NETWORK PROGRAMS

Affiliation contracts between broadcast stations and networks typically provide that the station will be compensated for carrying specific network programs, commercials, and other material, including, but not limited to, network identifications, credit announcements or promotional material. In order to collect payment, the station periodically submits a statement to the network certifying that the specified network material has been broadcast. A certification form usually has space to indicate deletions or cancellations of network material. If deletions or cancellations are indicated by the station, the amount of payment received from the network may be reduced. "Network clipping" means that the licensee has not fulfilled its contractual obligation to the network, by certifying that specified network material was broadcast in full when there were, in fact, cancellations or deletions. Because of the number of complaints that have been filed with the Commission on network clipping, often confirmed upon investigation, this public notice is being issued to clarify further the Commission's policy in this area, as well as pertinent rules and Commission cases dealing with network clipping.

Licensees are cautioned that as a general proposition the Commission considers falsely certifying that network material has been carried to be a use of a licensed facility for fraudulent purposes, which raises serious questions as to a licensee's qualifications to hold a broadcast authorization. The Commission's concern exists regardless of whether the clipped material consists of advertising, program content, or other material provided by the network, and regardless of whether network clipping exists because of the licensee's knowing participation, its indifference, of its failure to adequately supervise or control its employees or agents.

One party has indicated that it believes that the Commission's concern as to network clipping expressed above is a change from the policy set out in *Radio Station WSOC, Inc.*, 21 FCC 887, 943, 12 RR 953, 1007 (1956). In the *WSOC* decision, the Commission did not award a demerit in a comparative hearing where an applicant had deleted network material (not program content), because the deletions were made with the full knowledge of the network. Network clipping, as defined above, refers only to situations where the network is not aware of the clipping because of false certifications submitted by the affiliated sta-

tion. Thus, there is no inconsistency between the *WSOC* case and the Commission's statement here.

Where the clipped material contains advertising, licensees are subject to forfeitures under the fraudulent billing rule, Section 73.1205. See, for example, *Radiozark Broadcasting of Louisiana*, 32 FCC 2d 603 (1971). Licensees should note that the material appearing at the end of certain television contest or quiz programs disclosing the receipt of payment for the use of merchandise on the program is a commercial announcement, unless the announcement comes under the terms of the *proviso* clause of Section 317(a) of the Communications Act, *National Broadcasting Co.*, 27 FCC 2d 75, 20 RR 2d 901 (1970), affirmed on reconsideration; *American Broadcasting Co.*, 30 FCC 2d 827, 22 RR 2d 220 (1971). Clipping of such commercial material, while certifying to the network that it was broadcast, has resulted in the assessment of a forfeiture, *Channel 13 of Las Vegas, Inc.*, 37 FCC 2d 518, 25 RR 2d 286 (1972). Clipped material at the end of programs may also contain the sponsor identification required by Section 317 of the Communications Act and by Sections 73.119, 73.289 and 73.654 of the Commission's Rules, providing another basis for the imposition of forfeitures or other sanctions.

In some situations, primarily involving television stations, the network may determine that no payments to the station are warranted because of the station's limited audience. The network may, however, agree to pay all or part of the costs of providing its programming to the station by wire or microwave transmission. The assumption of these costs constitutes consideration. Licensees in these circumstances should carefully read their affiliation contracts to assure that no certifications are issued to the network that provide false information as to the station's compliance with the terms of the contract.

Nothing in this Notice should be interpreted to place any limitation on the licensee's discretion to delete any material that it believes to be indecent, profane, obscene, in bad taste, or otherwise contrary to the public interest. The Notice is intended to emphasize that such deletions or cancellations should be accurately disclosed in the certifications to the network. This Notice is not intended to apply to clipping of a few seconds duration that occasionally results from switching or other technical problems. Finally, this Notice is directed toward the obligations of the licensee. The licensee is not responsible for material deleted by the network; for example, the editing of films by a network to conform to time requirements, or returning to a sports event after a network commercial when play was resumed during the commercial.

The above refers to situations in which fraudulent certifications are given to networks. In some circumstances, licensees may delete portions of network program content in order to insert local commercial announcements, but notify the network of the deletions. If information coming to the attention of the Commission indicates that this is a frequent practice, the Commission will consider, on the facts presented, whether the licensee has subordinated the public's interest in viewing or hearing programs in their entirety to the licensee's private interest in maximizing the sale of commercial time.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 73–248

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
PICKENS COUNTY CHAPTER OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
Concerning Availability of Renewal Application of Pickens County Broadcasting Co., Inc., Aliceville, Ala.

MARCH 2, 1973.

MR. R. E. HOOK,
Pickens County Broadcasting Co., Inc.,
P.O. Box 309,
Aliceville, Ala. 35442

DEAR MR. HOOK: The Commission is in receipt of a request on behalf of the Pickens County Chapter of the National Association for the Advancement of Colored People for an extension of time to file a petition to deny the application for renewal of license for Radio Station WRAG, Carrollton, Alabama (BR–2646). In support of that request, it was stated that a copy of the renewal application was not available for public inspection at the station's offices on two occasions.

Section 1.526 of the Commission's Rules and Regulations requires broadcast licensees to keep certain records, including a copy of the most recent renewal application, available for public inspection. In view of the possible violation of that rule, you are requested to comment on the N.A.A.C.P.'s allegations within twenty (20) days of the date of this letter. A copy of your comments should be sent to Rev. James H. Corder, President of the Pickens County Chapter of the N.A.A.C.P. He will then have ten (10) days within which to reply.

BY DIRECTION OF THE COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-323

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST FOR WAIVER OF THE "OFF-NETWORK" RESTRICTIONS OF THE PRIME TIME ACCESS RULE (SECTION 73.658(k)(3)) FOR THE "AMERICA" SERIES (PETITION OF HUGHES TELEVISION NETWORK AND NEEDHAM, HARPER AND STEERS ADVERTISING, INC., AS AGENT FOR XEROX CORP.)

MEMORANDUM OPINION AND ORDER

(Adopted March 21, 1973; Released March 26, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND WILEY CONCURRING IN THE RESULT.

1. The Commission here considers a "Petition for Waiver of the Prime Time Access Rule" filed on January 18, 1973 seeking waiver of the "off-network" restrictions of the prime-time rule (Section 73.658 (k)(3)) to permit the presentation during the "access period" in 1973–74 of the 13-program "America" series now on NBC alternate Tuesdays at 10 p.m. The joint petitioners are *Hughes Television Network*, over which the program would be presented during this coming season, and *Needham, Harper and Steers Advertising, Inc.* as agent for *Xerox Corporation*. The latter owns the rights to the first two showings of the program on commercial TV, including the present NBC run (for which it is paying NBC for the time) and the run in 1973–74 on the Hughes Network which is contemplated in the petition.[1] We also consider here oppositions to the petition filed by parties, discussed briefly below, and a reply to oppositions filed by the joint petitioners.

2. As the petition points out, the 13-program, one-hour "America" series, currently running on NBC at 10 p.m. E.T. and P.T. every other Tuesday, is a presentation of American history featuring the award-winning journalist Alistair Cooke. The petition points out that the series has received considerable acclaim from critics, and also praise from educators and parents for its educational value. A total of some 185 letters from educators, parents, and children were attached to the original of the petition. One of the chief problems in the latter connection is said to be the hour at which the program is presented,[2] too

[1] Hughes Television Network, although it is a "network" for some purposes, is not within the definition of a "network" used in the "syndication", "financial interest" and "prime time access" rules adopted in 1970; see Section 73.658(j)(4). Therefore the only matter involved here is the fact that the program has been previously shown on NBC.

[2] The petition states that NBC was the only network interested in prime-time showing of this series, and that it offered only the 10 p.m. time. The petition asks for waiver on condition that the program be shown not later than starting at 8 p.m. E.T.

late for children's extensive viewing, and the letters urge that it be scheduled earlier. Therefore, Hughes and Needham, Harper ask waiver so that the program may be presented during the "access period" early in the evening, outside of the regular network schedule. Aside from the value of the program, and its "instructional" character assertedly making it the type of public-service material the Commission has long encouraged, the following arguments are urged in support of waiver: (1) the *independent character* of the material, with the network never having any financial interest in it or voice in its production, but simply receiving money for the network time from Xerox (the program was co-produced by BBC and Time-Life Films), so that this is the type of material that the prime-time access rule was designed to further; (2) the similarity of this situation to the *Six Wives of Henry VIII* series, in which waiver was granted (35 FCC 2d 773) in that it involves only a short series and thus minimal impact on the availability of access time to other, completely new material, and also in the limited extent of network exposure (13 episodes run once on NBC) and the difficulty of finding an hour of evening time without impinging on prime time; (3) the fact that for a large and important segment of the audience—the children who cannot view it at its late network time—this would be in effect its "first run."

3. As mentioned, four parties filed oppositions to the petition, at least to favorable action on it at this time, while the over-all rule making proceeding concerning the rule, Docket 19622, is pending. The four included CBS, which opposes the rule generally and in its comments in that proceeding, and three other parties who are among the more vigorous supporters of the rule in that proceeding: Westinghouse Broadcasting Company, Inc., a large TV multiple owner and also a supplier of non-network TV programs; Metromedia Producers Corporation, a program producer and supplier (wholly owned by Metromedia, Inc., a large multiple owner) and the National Association of Independent Television Producers (NAITP). The same four parties opposed the off-network waiver request for the *Wild Kingdom* program which we recently considered (In the Matter of *Mutual Insurance Co. of Omaha*, FCC 73, decided March 13, 1973), and they generally make the same arguments here. Since these were discussed at some length in that decision (pars. 4–5), they will be summarized very briefly here. It is urged by some or all of these parties that: (1) with the prime-time access rule generally, and this "off-network" aspect of it (including waivers) specifically under consideration in Docket 19622, decision now on the *America* request is not appropriate but would amount to a fragmentary decision of the matters at issue in that proceeding, and possibly pre-judge some of the important issues therein; (2) grant of waiver would be on the basis of the "merit" or "worthwhile character" of the program, assertedly an improper, and possibly an illegal, basis for Commission determinations, as numerous parties, on both sides of the basic question as to the rule, asserted in their comments in Docket 19622; (3) use of the access period is not necessary for the presentation of this material, since it may be presented freely by stations, at times as well or better suited for children, outside of prime time or, if desired, by preempting network programming during prime

time; (4) in the fall of 1972, after experiencing the problems involved in these "off-network" waiver requests, the Commission adopted a tighter policy with respect thereto, including public notice and opportunity for comment and a policy that in the absence of a showing of "special circumstances", grant would not be forthcoming in advance of the overall Docket 19622 decision; and petitioners have not shown any compelling reason for deviation from that policy (see *Storer Broadcasting Company*, 37 FCC 2d 933, *Time-Life Films*, 25 R.R. 2d 793); (5) any emphasis on the "short series" character of the *America* material (13 programs) is misplaced, and simply underlines the danger of attaching any importance to this aspect of the matter at all, as we did with the 6-program *Six Wives of Henry VIII* series; (6) the argument concerning the importance of an early-evening presentation is one which can be, and has been, made with respect to practically every program for which waiver of this sort has been requested.[3]

4. In reply to the substantive arguments in these oppositions, petitioners urge the following points: (1) it simply is not realistic to expect this program to be shown at a suitable time without waiver of the rule, as the Commission recognized in *Wild Kingdom* and other decisions, for one thing because instructional programs cannot compete, audience-wise, with straight entertainment material (it is also claimed that this material is designed for *family* viewing, for which early evening is the ideal time); (2) the argument concerning decisions based on the "worthwhile" or "meritorious" character of a program is not well taken here, where all petitioners ask the Commission to do is to look at the numerous and emphatic expressions as to the program's value made by critics, educators, parents and children, to which we cannot properly close our eyes, and this is particularly true where the program is not entertainment but instructional and "public service" in character—a type of programming the Commission has long sought to promote.

5. In the original petition for waiver, Hughes and Needham, Harper did not specifically ask for a decision on their request in advance of the over-all decision in Docket 19622. They do seek this in their reply, asking for a decision before March 26, 1973, the time of the NAB convention. It is asserted that grant of the request is well within Commission precedent—particularly the decision concerning *Six Wives of Henry VIII*—[4] and that failure to act very soon will prejudice petitioners, in that stations are now preparing their schedules for the 1973–74 season and, after the date mentioned late in March, will no longer have flexibility to include the *America* series therein. As to the arguments by opponents that such action would be premature and a fractionation and pre-judgment in the decisional process, it is asserted that these arguments are without basis. It is claimed that the opponents do not show that grant would in any way prejudice the ultimate resolution of the proceeding, and that, to avoid the type of prejudice

[3] Metromedia and NAITP incorporate by reference herein their lengthy pleadings in Docket 19622, in which they vigorously supported the rule and strict enforcement of it, taking generally the position that virtually no waiver of the "off-network" restrictions for a particular program is warranted. See summary of these comments in the *Wild Kingdom* decision, pars. 8–10.

[4] *Time-Life Films*, 35 FCC 2d 773 (June 1972) and, on reconsideration, 25 R.R. 2d 793 (November 1972).

referred to, petitioners are entitled to a timely ruling on the basis of the precedent cited.

DISCUSSION AND CONCLUSIONS

6. Upon careful consideration of the foregoing material, we are impelled to reach the same conclusion here that we did recently in connection with a request for waiver of the rule to permit a network to present a children's program produced by Children's Television Workshop—that decision on the matter is not appropriate at this time, but must await the over-all decision in Docket 19622, the general prime-time access rule proceeding. As mentioned there, decision in that proceeding is expected within the next 60 days, or by mid-May if not before; if it is not to be forthcoming by that time, we will review this course of action on our own motion.

7. As indicated by the material summarized above, the questions involved here are not simple, nor do they lend themselves well to decision in the context of one waiver request alone. The whole prime time access rule is now the subject of a pending proceeding, Docket 19622, and this includes specifically the question of what approach should be used in dealing with these off-network requests of a general nature, as well as whether the various "off-network" decisions reached in 1972 were correct (see Notice of Inquiry and of Proposed Rule Making in Docket 19622, 37 FCC 2d 900, 916–918, 920). As indicated above, a large number of parties, including parties on both sides of the basic question of whether the rule should be retained or repealed, discussed this matter, and tended to oppose any approach under which the Commission takes unto itself the role of deciding whether or not a particular program is "meritorious" or "worthwhile" so as to justify waiver to permit its presentation during the access period on top-50 market affiliated stations. While these views are not necessarily persuasive or determinative, and while a number of parties (including some supporting the basic prime-time rule) urged us to abandon the "off-network" restriction entirely, the whole subject, and the various arguments urged, require careful consideration on an over-all basis. Action on a new waiver request in the interim we conclude not to be appropriate. We do not necessarily agree with Westinghouse et al. that this would be a "prejudgment" of some of the important issues in Docket 19622; but in view of the amount of material filed in that proceeding which bears on this question (including reply comments filed March 12), it is appropriate to defer decision in the present matter until we have had further opportunity to give comprehensive consideration to the subject.

8. Another problem is the fact that we have recently reached the same conclusion with respect to the Children's Television Workshop request for waiver of the rule to permit a network to carry a weekly CTW-produced children's program at 7:30 E.T., in addition to the regular three hours of network material the same evening. While the issues in the two cases are by no means entirely the same—e.g., one request would involve a network program, the other off-network material—the two matters are interrelated in that they both involve demands for making available a portion of the "access period" on a

basis not contemplated by the rule. There is a limit to the extent to which such demands can be accommodated, unless the thrust of the rule is to be drastically changed, and therefore we do not conceive it to be appropriate to grant one of these requests for immediate action after denying the other. We recognize that denial of immediate relief in both cases is different from the March 13 action granting continuation of the *Wild Kingdom* waiver at this time, but as mentioned in that decision, that request falls into a different category from the present one and the CTW proposal, in that it seeks simply *continuation* of an existing waiver and thus preservation of the status quo. These, on the other hand, would involve an *expansion* of the waiver process, which should not be done before we have considered the entire subject.

9. With respect to petitioners' argument that grant (at this time) is dictated by our 1972 *Six Wives of Henry VIII* decision, we do not find this persuasive. In the first place, this is not an exact precedent; one of the important grounds for that decision was the small impact on the availability of prime time to new non-network material from use of a 6-program series, whereas the *America* series involved here is 13 programs, or over twice as long. Moreover, it was the problems and complexities involved in that situation, and others in 1972, which led to concern on this subject and adoption of a tighter policy pending the over-all decision. We have also noted the argument that action *now* is necessary—while stations still have flexibility in planning their 1973–74 schedules—if the program is to be shown on affiliated stations in the top 50 markets during the 1973–74 season. Even if true, this is only a private interest, outweighed as far as new waivers are concerned by the public interest in reaching an orderly, comprehensive decision on the whole subject of the "off-network" restrictions of the rule (and the rule itself). Moreover, with only a 13-week program involved, it appears possible, at least, that there is a greater degree of flexibility later in the year that would be the case with a year-long series such as *Wild Kingdom*. In other words, even if clearances for the *America* series are not obtained for the fall of 1973 (assuming a favorable decision on its request within the next 60 days or so), it is conceivable that they might be obtained later, for presentation starting, say, in January 1974, which would permit ample time for running the series in 1973–74.

10. Accordingly, for reasons stated, the "Petition for Waiver of the Prime Time Access Rule" filed on January 18, 1973, jointly by Hughes Television Network and Needham, Harper and Steers Advertising, Inc. as agent for Xerox Corporation, IS HELD IN ABEYANCE.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73–320

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINTON, D.C. 20554

In Re Application of GORDON S. ROSENBLUM (ASSIGNOR) and COLUMBINE BROADCASTING CO. (ASSIGNEE) For Assignment of License of KADX (FM), Denver, Colo.	File No. BALH–1644

MEMORANDUM OPINION AND ORDER

(Adopted March 21, 1973; Released March 23, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. The Commission has before it the application for assignment of license of KADX (FM), Denver, Colorado from Gordon S. Rosenblum to Columbine Broadcasting Company and a Petition to Deny filed by Mission Denver Co., licensee of KBTR, Denver, Colorado, and Eugene P. Winans, an agent and/or employee of Mission Denver Co. and responsive pleadings.

2. Mission Denver bases its claim for standing on a pending lawsuit for specific performance of an alleged agreement to sell KADX (FM) to Mission Denver. While petitioners do have standing under *Granik v. FCC*, 234 F 2d 682 (D.C. Cir. 1956), the Commission need not await final determination of the suit before acting on the instant assignment application. By an amendment to the purchase agreement dated May 5, 1972, the assignor and assignee agreed that the closing is subject to and conditional upon the outcome of the suit and that the assignor and assignee would file any application with the FCC necessary to effectuate any final judgment in litigation. Since the buyer and seller have evidenced their willingness to transfer the station to Mission Denver, if required by the outcome of the suit, a grant of this application would not have an adverse affect on petitioner's interests. This is in accord with *Carnegie Broadcasting Co.*, 5 FCC 2d 882, 8 RR 2d 1244 (1966), in which a petition to deny a renewal application, based on a suit for specific performance of an alleged agreement to sell the station to the petitioner, also concerned a co-pending assignment application which was to be acted on simultaneously with the renewal. Although recognizing the petitioner's claim to standing under *Granik*, the Commission dismissed the petition and granted the assignment and renewal applications because of the representations of the assignor and assignee that they would reassign the license if the court decreed specific performance and because it found that the petition did not raise any other issue against the parties to the application.

3. The petition questions the qualifications of the assignee to become a licensee of a broadcast facility based on the past activities of and information furnished in the assignment application concerning two of the principals of the assignee, Kenneth B. Lange and William A. Kilpatrick. An amendment dated January 12, 1973 reports the withdrawal of William A. Kilpatrick as a principal. Accordingly, the questions concerning him are now moot.

4. Kenneth Lange is the president of the assignee, 20.49% stockholder, and proposed general manager of the station. Mr. Lange was formerly employed by KTLK, Denver, as sales manager from November 1963 and as co-manager of the station from December 1970 until November 31, 1971. He is currently employed as a salesman at KADX (FM). On June 29, 1972, the Commission designated for hearing KTLK's renewal application (Docket No. 19274) on 10 issues involving questionable promotions and contests, falsification of weather reports, leaving the transmitter unattended, logging violations, and misrepresentation. The petition argues that before the Commission can approve Columbine Broadcasting Company as a licensee it must have full information concerning the involvement of Mr. Lange in the affairs at KTLK, including (a) the promotion which occurred in July 1970 and the erroneous information furnished to the attorney for the licensee for filing a report to the Commission concerning the promotion; (b) other questionable promotions and contests which occurred while Mr. Lange was sales manager of the station; and (c) the circumstances of termination of the employment of Mr. Lange at KTLK.

5. The renewal applicant, Action Radio, Inc., had filed a petition for reconsideration, which was denied on September 1, 1972. From the pleadings and statements which were filed in connection with that petition and from the Broadcast Bureau's Bill of Particulars which was served on Action Radio, Inc. to give further details on the issues specified in the hearing order, it appears that Mr. Lange did not play a role in any of the questionable practices except for being present as an observer at the miniskirt contest held in front of the Paramount Theater on July 10, 1970. The circumstances of termination of employment of Mr. Lange are not at issue in the hearing, and the petitioner does not suggest how they are relevant to Mr. Lange's qualifications as a principal of the assignee.

6. In its petition for reconsideration filed in the KTLK renewal proceeding Action Radio alleged that statements made by Mr. Lange and others to its attorney, Richard Hildreth, on December 28, 1970, caused it to represent to the Commission that there was no obstruction of traffic at the miniskirt contest. In an affidavit filed with the petition for reconsideration Mr. Lange recalled that he had advised Mr. Hildreth that "traffic moved unobstructed." In the affidavit Mr. Lange also described the circumstances of the contest in detail and stated that "Traffic moved at a slightly slower pace." His detailed description of traffic conditions in the affidavit is not inconsistent with his earlier statement to Mr. Hildreth, and the statements do not raise a substantial or material question of fact requiring either an evidentiary hear-

ing or withholding action on this application pending final decision in the KTLK proceeding.[1]

7. Accordingly, IT IS ORDERED, that the Petition to Deny filed by Mission Denver Co. and Eugene Wynans IS DENIED and the application for assignment of license of KADX(FM) from Gordon S. Rosenblum to Columbine Broadcasting Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[1] Mr. Lange was not called to testify at the KTLK hearing.

F.C.C. 73-302

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF STEARNS COUNTY BROADCASTING CO., LICENSEE OF RADIO STATION KASM, ALBANY, MINN.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1973; Released March 19, 1973)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture issued October 6, 1971 and addressed to Stearns County Broadcasting Company, licensee of Radio Station KASM, Albany, Minnesota and (2) the licensee's response to the Notice of Apparent Liability received on October 26, 1971.

2. The Notice of Apparent Liability in this proceeding was issued because of the licensee's apparent willful or repeated violation of Section 73.93 of the Commission's Rules in having an improperly licensed operator in charge of the routine operation of the transmitter during periods which included from October 10, 1970 to November 17, 1970 from 6:00 a.m. to 8:00 a.m. and 9:30 a.m. to 11:45 a.m., on Mondays through Fridays, and from 8:00 a.m. to 12 noon on Sundays.

3. In response to the Notice of Apparent Liability, which is in the form of an application for remission, the licensee did not deny the violation but stated that the operator was employed by the licensee in 1953 at which time the operator held a third-class license and the operator has passed the third-class operator's examination subsequent to the inspection

4. The inspection which served as a basis for the Notice of Apparent Liability revealed that the operator held only a Restricted radiotelephone operator's permit at the time of inspection and for six years prior thereto.

5. We find that an improperly licensed operator, not holding a radiotelephone operator's license of the first, the second, or the third-class with broadcast endorsement, was in charge of the routine operation of the transmitter during the period October 10, 1970 to November 17, 1970 from 6:00 a.m. to 8:00 a.m. and 9:30 a.m. to 11:45 a.m. on Mondays through Fridays and from 8:30 a.m. to 12 noon on Sundays, in violation of Section 73.93 of the Commission's Rules. We find that the violations were repeated during the period from October 10, 1970 to November 17, 1970, and therefore we find it unnecessary under the Communications Act of 1934, as amended, to make any additional

determination as to whether the licensee's actions constituted willful violations. *Paul A. Stewart*, FCC 63–411, 25 RR 375. Considering the licensee's reply and the circumstances of this case, we are not persuaded to remit the forfeiture.

6. In view of the foregoing, IT IS ORDERED, That Stearns County Broadcasting Company, licensee of Radio Station KASM, Albany, Minnesota FORFEIT to the United States the sum of five hundred dollars ($500) for repeated violation of Section 73.93 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504 (b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to Stearns County Broadcasting Company, licensee of Radio Station KASM, Albany, Minnesota.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-327

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 61 OF THE COMMISSION'S RULES RELATING TO TARIFFS AND PART 1 OF THE COMMISSION'S RULES RELATING TO EVIDENCE.	Docket No. 18703

MEMORANDUM OPINION AND ORDER

(Adopted March 21, 1973; Released March 27, 1973)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; REID AND WILEY CONCURRING IN THE RESULT; COMMISSIONER JOHNSON DISSENTING.

1. The Commission has before it several petitions requesting reconsideration of our Final Report and Order released herein on October 13, 1970 wherein we adopted certain tariff and evidentiary rules. 25 F.C.C. 2d 957 (1970). These petitions were filed on or about November 12, 1970 by two domestic carriers, American Telephone and Telegraph Company (AT&T) and the Western Union Telegraph Company (WU), and by two international carriers, Western Union International, Inc. (WUI), and RCA Global Communications, Inc. (RCA). In addition, an opposition to the AT&T, WU, and WUI petitions was filed by the National Retail Merchants Association (NRMA).

2. In essence, the petitioners raise both legal and policy objections to the rules. Insofar as the legal issues are concerned, it is argued:

(a) that Section 203(d) of the Communications Act, as amended, sets forth the one and only basis upon which the Commission may reject a tariff filing, that is, for failure to give "lawful notice of its effective date" and that, therefore, the Commission is without power to reject tariff filings for violation of the Commission's rules.

(b) that the requirement that tariff increases and data in support thereof be filed sixty days prior to the effective date of such proposed *increase* is contrary to the requirements of Section 203(b) of the Communications Act which puts a limitation of thirty days notice which the Commission may require of any proposed tariff revision including *increased* rates.

(c) that the requirement for data to support *new* or *reduced* rates, as distinguished from *increased* rates, is an unlawful attempt to place the burden of proof on the carrier with respect to *new* or *reduced* rates and that Section 204 places such burden on the carrier only with respect to *increased* rates.

3. The objections raised in the petitions on policy grounds relate to such matters as:

(a) the propriety or wisdom of including various requirements with respect to the filing of data and forecasts in those instances where there are competing carriers;

(b) the need to keep data confidential in those instances where there is actual active competition between carriers;
(c) the alleged reliance on cost data to the exclusion of other considerations;
(d) the need for and usefulness of three-year projections as well as the other detailed data required;
(e) the advisability of substituting a provision which would permit the carrier to cure or rectify deficiencies in their filings rather than subjecting such filing to rejection;
(f) the alleged requirement for data that is not reasonably required to facilitate an understanding or evaluation of any particular filing;
(g) the need for exemptions from rules for tariff changes involving routine alterations on the basis that it is not necessary that the Commission have a detailed analysis of routine changes; and
(h) the need to formulate rules closely related to the diverse situations of each of the various kinds of carriers, such as, for example, certain rules for domestic landline carriers, certain rules for the domestic miscellaneous carriers and other rules for the international voice carrier and the several international record carriers.

DISCUSSION

Legal issues

4. We shall address the legal objections first. In this connection we note that many of the matters raised in the petitions for reconsideration merely repeat arguments set forth in previous pleadings. We have considered such arguments fully in our Final Report and Order and find no basis for changing our original decision thereon. Insofar as the petitioners' first contention is concerned, that we have power to reject tariffs only for failure to provide a 30-day effective date on tariff filings, it is sufficient to note that we and the courts have held to the contrary. We have held that we can reject tariffs even when the effective date shown on the tariff provides the full 30 days' notice where, for example, there is lack of authorization to perform the service offered in the tariffs. *In Re AT&T Private Line Rate Case*, Dockets 18128 and 18684, FCC 72-619, 36 FCC 2d 484 (July 17, 1972); *Press Wireless, Inc.* 21 FCC 311; 511 (1956); aff'd. 264 F.28 372 (D.C. Cir. 1959). Moreover, subsequent to our Final Report and Order and the filing of the petitions for reconsideration, the U.S. Court of Appeals for the District of Columbia has summarized the powers and duties of regulatory agencies to reject tariffs in the following language:

> We recognize, however, that an agency has the power and in some cases the duty to reject a tariff that is demonstrably unlawful on its face. Thus, an agency will reject a tariff that conflicts with a statute, *agency regulation or order*, or with a rate fixed in a contract sanctioned by statute; similarly, a tariff will be rejected if it is unlawful without prior agency approval, and approval has not been obtained. *The Associated Press* v. *FCC et al.*, 448 F. 2d 1095 (1971) (D.C. Cir.) (Our underscoring).

5. In connection with the above-stated language of the court, it is to be noted that we have never construed the provisions of Section 203(d) as limiting the Commission's powers of rejection solely to tariffs that fail to give notice of their effective date. Rules relating to the filing of tariffs have been in effect during almost the entire period the Commission has existed. These rules, now incorporated as Part 61 of the Commission's rules, set forth numerous requirements with respect to tariffs in addition to notice of effective date. Failure to comply with these rules has always been recognized as grounds for rejection. Petitioners

have not heretofore challenged the power of the Commission to reject a tariff which fails substantially to comply with rules governing such minor matters as letters of transmittal, number of copies, prepaid postage, erasures, alterations, etc. none of which is expressly mentioned in Section 203(d) of the Act as grounds for rejection. In light of all of the foregoing, we cannot accept as valid a challenge to the authority of the Commission to reject a tariff which is in patent violation of any of the provisions of Part 61 of the Rules. Accordingly, we reiterate our position, for the reasons set forth above and in paragraphs 47 through 52 of our Final Report and Order that we have ample authority to reject a tariff for failure to comply with these rules (See, 25 FCC 2d 957; 973–975).

6. Fears are expressed in the petitions to the effect that the Commission will exercise power arbitrarily in the rejection of tariffs. In the more than 2 years that the rules have been effective, out of many thousands of filings made, there have been but few rejections based upon failure to comply with our rules. Section 61.69(c) states that failure to comply with our rules constitutes "grounds" for rejection. However, the rule does not mandate that we reject all tariffs that do not comply fully with our rules. Section 61.69(c) means that tariff filings are subject to the exercise of reasonable judgment in implementing the rejection provisions. As the record shows, we have not invoked this power lightly, frequently, or in an arbitrary fashion. Thus, we reject the contention that we will abuse our discretion in exercising our authority to reject tariffs for rule violations. Furthermore, in the light of the experience since the rules became effective, we must reject as unfounded in fact the allegations that retention of our rules will invite incessant petitions for rejections by the public or protracted court tests of every significant filing not rejected.

7. We have dealt fully with the second legal argument challenging the validity of the 60 days' notice requirement for rate increases and data in support thereof, in paragraphs 37 through 43 of our Final Decision and Order (See, 25 FCC 2d 957; paragraphs 969–971). We note that no arguments of any significance in addition to those already considered have been made on this point. Accordingly, we reaffirm our conclusion that we have ample authority under Sections 4(i), 4(j), and 203(b) of the Act to require the submission of tariffs and data in support of proposed increases 60 days in advance of the effective date of such increases.

8. As to the third and final legal issue raised, i.e., the power of this Commission under Section 204 to require submission of detailed supporting data in connection with *new* or *changed* tariff material (not involving a rate *increase*), we believe that petitioners have misconstrued the effect of Section 204 and have misunderstood both the purpose and effect of our rule (Section 61.38) and the legal authority upon which it rests. Petitioners first premise their argument on the contention that Section 204 sets forth the one and only situation under which carriers have any burden of proof in any proceeding involving questions of lawfulness of their tariffs, i.e., only at hearings involving a charge *increased* or sought to be *increased*. For reasons which we shall state, we disagree with this basic contention.

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9. Section 204, enacted in 1934, does not say, as the petitioners appear to contend, that it is *only* in cases of increased rates that a carrier has any burden of proof.[1] Subsequent to the passage of Section 204, the Administrative Procedure Act was enacted with the provision that "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. 556(d) Thus, it would appear clear that in any tariff proceeding in which the carrier seeks a rule or order from the Commission approving or prescribing a charge, regulation, classification or practice the carrier would have the burden of proof irrespective of whether *increased* rates are being sought. In addition, we have repeatedly held that the burden of proof is on the carrier in tariff proceedings (where *increased* rates are not being sought) involving questions of lawfulness of "like and contemporaneous communication service between the same points at different charges to different users." *Private Line Rate Case*, 34 FCC 217, at page 317 (1961); *Telpak Case*, 38 FCC 370, 381–382 (1964); *Telpak Sharing Case*, 23 FCC 2d 606, at page 625 (1970). On review of our Telpak decisions, the U.S. Court of Appeals for the District of Columbia Ct. affirmed our decisions including our holding therein on burden of proof in the aforementioned types of cases. *American Trucking Association, Inc.* v. *FCC*, 126 U.S. App. D.C., 236, 377 F.2d 121 (1966), *cert. denied*, 386 U.S. 943 (1947). Accordingly, we reject the basic contention made herein that carriers have the burden of proof in tariff or rate proceedings *only* where *increased* rates are being sought.

10. Furthermore, it is our view that questions of burden of proof in rule-making cases involving the lawfulness of tariffs are largely academic. Under our procedural rules carriers are required to open and close in such cases and, irrespective of where the burden of proof lies, we must make our decision on the basis of reliable, probative and substantial evidence of record whether adduced by the carriers or other parties. Additionally, contrary to the contentions, we do not view the requirements in our tariff rules for the submission of data to support *new* or *changed* tariffs, as having any effect whatsoever on whether or to what extent a carrier may have the burden of proof in any rate or tariff proceeding. In this respect petitioners misconstrue the purpose and effect of our rules. As the reviewing court held in *The Associated Press* case, *supra*, the purpose of our rules is "to provide the Commission with the information necessary to decide whether an investigation and suspension of proposed rates should be ordered" and referred to the decision by the U.S. Supreme Court in *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970), holding that similar rules of the Interstate Commerce Commission are "mere aids to the exercise of the agency's independent discretion." Thus, the purpose and effect of our rules in this regard is not to impose new burdens of proof on carriers but is to provide us with information by which, in the reasonable exercise of our discretion, we can determine the orderly and proper procedures to follow in the solution of the difficult and

[1] The relevant provision states that "At any hearing involving a charge increased or sought to be increased, after the organization of the Commission, the burden of proof to show the increased charge, or proposed increased charge, is just and reasonable shall be upon the carriers * * *" 47 U.S.C. 204.

complex problems increasingly presented in tariffs filed with us by the carriers. In short, the purpose of the rules is to elicit information and data which will facilitate the Commission's judgment as to whether such proposed tariffs present questions of lawfulness which warrant our investigation and hearing.

Policy objections

11. We have also given careful consideration to the aforementioned policy objections raised by petitioners and it is our conclusion that such objections do not warrant any revisions in our final decision or any substantive changes in our rules. Although extended discussion of such objections is not warranted, it may be useful to touch briefly upon the principal reasons for our conclusion.

12. We recognize that, in competitive situations, the requirement of our rules that a carrier must submit cost and other data to support new or revised competitive tariffs may make it necessary for such carrier to make public certain information about its operations that it would not ordinarily want to reveal to its competitors. However, disclosures of this nature are inherent characteristics of the regulatory requirements imposed by the Communications Act on carriers subject to our jurisdiction. Carriers must, for example, make public their prices through tariffs filed with us and they must adhere to such prices until changed on proper advance public notice; and, with certain limited exceptions, carriers' contracts, agreements, arrangements, statistics, tables and figures contained in annual and other reports filed with the Commission must be made public. 47 U.S.C. 412. Moreover, carriers have the obligation under the Act to supply such information as the Commission may need to enable it to carry out its regulatory duties. 47 U.S.C. 218, 219. Our own recent experience under these rules, has been that the submission by carriers of the required cost and other data to support competitive tariff filings has been helpful to us in determining the most orderly and effective regulatory steps to be taken and procedures to be followed in administering the Communications Act and implementing our policy and objective thereunder of maintaining such competition on a full and fair basis. (See, e.g., proceedings in Dockets 18684, 19129, 19419 and 19546.) We have found that it is particularly important to obtain the data required by our rules where questions are raised as to whether a new or reduced rate competitive service is being cross-subsidized by other services and whether there is factual support for allegations of anti-competitive impact from such rates. Thus, the value of our rules as a regulatory tool in the public interest far outweigh any supposed detriment to the private interests of carriers who desire to keep such data from their competition. Moreover, petitioners have made no persuasive showing that, as a general rule, the submission of the kind of data we require will, in fact, reveal sensitive data that actually affords competitors any advantage over the filing carrier in the market place.

13. Much concern was expressed in the petitions that our rules seem to place too heavy reliance on cost data to the exclusion of other considerations (e.g., value of service) which allegedly may also support proposed rates, particularly competitive rates. However, our require-

ment for the submission of cost data does not mean that we intend to consider only cost as support for tariff filings, to the exclusion of other factors or principles. On the other hand, the carriers themselves generally stress that their revenues must exceed their costs, and our established regulatory policies are to regard costs either as directly controlling in the fixing of rates or as benchmarks from which to measure any departures from costs with a clear and persuasive showing required for such departures. *Private Line Rate Case*, 34 F.C.C. 217, at page 231 (1963). Subject to the foregoing, carriers are free to submit any data they wish, in addition to cost, to support their tariff filings and appropriate consideration will be given thereto.

14. With respect to our requirement that the carriers furnish 3-year estimates with respect to the effects of new or changed tariff provisions on the carriers' traffic and revenues, it is true that no carrier can foretell with complete accuracy what will happen over a future 3-year period, particularly in a field as dynamic as interstate and foreign communications. On the other hand, it appears to us that responsible management would not ordinarily undertake to make new or revised service or rate offerings unless and until it has surveyed the potential market and made some assessment of what it may expect will be the results of such offering. Under these circumstances we find it reasonable to have a general rule, subject to waiver in appropriate cases, that the Commission be furnished with such projections to assist it in discharging its statutory duties.

15. With respect to the advisability of adopting a new rule which would allow the carriers to cure or rectify deficiencies in their filings, before rejection, we believe that such a rule would unreasonably inhibit the ability of the Commission to take on its own motion or in response to pleadings filed by the public, prompt and effective action to prevent patently defective tariffs from becoming effective. Moreover, any rejection of tariffs for violation of our tariff rules is always without prejudice to the prompt refiling by the carrier of appropriate revisions in full compliance with the rules.

16. As to the contention that the data required by the Commission's rules should be limited to data that would be reasonably needed by the Commission to understand and evaluate tariff filings, we believe that our rules do just that and no more. The data required by Section 61.38 is the minimum which we believe is required for us to make necessary decisions with respect to most, if not all, tariff filings that are subject thereto.

17. As to the argument that a *de minimis* exemption should exist for certain kinds or levels of tariff filings and that a need exists for expanding or increasing the categories of items exempted from the requirements of the rules, we dealt fully with this matter in paragraph 26 of our final decision. Experience gained since the effective date of our rules indicates that there has been no great difficulty on the part of most carriers in complying with the requirements of our rules. Accordingly, we do not believe that we should revise our rules to allow for any further exemption at this time. With regard to the possibility of exemptions for so-called "routine" tariff changes, we indicated in paragraph 26 of our final decision that if it becomes apparent after experi-

ence has been gained that certain types of routine changes do not require all or part of the support required by our rules, then waiver of the rules would be granted or new rules would be promulgated. Based on our experience we believe that we should continue to handle any such "routine" exemptions by waivers made upon specific application by the carriers rather than by any rule changes at this time.

18. The contentions that the diverse requirements of the various kinds of carriers dictate different application of the rules as to each class of carriers are not sufficiently supported by probative factual data for us to conclude that any significant benefit would accrue to the carriers or to the public by making this kind of revision in our rules. It may be true that one class of carriers may have problem areas that other classes do not have, but we do not believe that any undue burden is placed upon any particular class of carriers under the rules as they now stand. In those instances where the carrier can make a reasonable demonstration that our rules as written cause undue burden or are not relevant to the rate schedule submitted, we will, of course, grant a waiver upon specific application therefor as provided for in the rules. If experience shows in the future that changes are necessary to accommodate the needs of different classes of carriers, we will entertain specific proposed amendments with respect thereto.

19. Although we have concluded that no changes should be made at this time in the rules under review, we currently have under consideration further possible changes therein. These prospective changes relate to the notice requirements for tariffs offering new or revised classes and sub-classes of service.[2] At the time of any such proposed rule-making, we expect to give consideration to any additional changes that interested parties may wish to propose in the light of further experience under the rules. However, there is one procedural rule change that we believe should be effectuated at this time.

20. The 14-day time period now permitted by Section 1.773(b) for filing petitions to suspend tariffs may be appropriate for tariffs that are filed on approximately 30 days' notice and we propose no change therein. However, our rules now require carriers to file tariffs which constitute rate increases on at least 60 days', rather than 30 days' notice (Section 61.58). As to such 60-day notice filings, we believe that petitions to suspend should be filed with the Commission and served upon the publishing carrier and the Chief, Common Carrier Bureau substantially earlier than is now permitted under the 14-day rule. At present, interested parties have approximately 16 days after a 30-day tariff is filed within which to prepare and submit any petitions to suspend. We believe that for tariffs that are filed on 60 days' notice we should modify the filing requirements so as to afford the Commission adequate time to consider protests without imposing undue time constraints on

[2] See Report and Order adopted January 31, 1973, in Docket No. 19117, FCC 73-132; 39 FCC 2d 131.

potential protesters. It appears to us that in these instances, it is reasonable to require any petitions to suspend to be filed within approximately 25 days after the tariff is filed. This would afford interested parties 9 days more than they now have to file objections to 30-day tariffs and would allow us adequate time to consider objections and timely filed responses. Accordingly, we shall require such petitions to be filed at least 35 days prior to the effective date of any 60-day tariff filing. This amendment to our rules is set forth in the attached Appendix. Authority for this amendment is contained in Sections 4(i), 4(j) and 203(b) of the Communications Act of 1934, as amended 47 U.S.C. 154(i), 154(j) and 203(b). Because this amendment relates to procedure and practice, the prior notice and effective date provisions of 5 U.S.C. 553 are inapplicable.

21. Accordingly, IT IS ORDERED, That the Petitions for reconsideration ARE DENIED, and that Section 1.773(b) of our Rules IS AMENDED, effective April 3, 1973, as set forth in Appendix A. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

ATTACHMENT

In Part 1 of Chapter 1 of Title 47 of the Code of Federal Regulations, Section 1.773(b) is revised to read as follows:

Section 1.773 *Petitions for Suspension of Tariff Schedules*

* * * * * * *

(b) *When filed.* Any petition for suspension shall be filed with the Commission and served upon the publishing carrier and the Chief, Common Carrier Bureau and the Chief of the appropriate Division of that Bureau at least 14 days before the effective date of the tariff schedule, except in those cases in which the tariff schedule in question is filed on 60, or more, days' notice to the public prior to the effective date thereof. In the latter cases, a petition for suspension shall be filed with the Commission and served upon the publishing carrier, the Chief, Common Carrier Bureau and the Chief of the appropriate Division of that Bureau at least 35 days before the effective date of the tariff schedule. In case of emergency and within the time limits provided herein, a telegraphic request for suspension may be sent to the Commission setting forth succinctly the substance of the matters required by paragraph (a) of this section. A copy of any such telegraphic request shall be sent simultaneously to the publishing carrier and the Chief, Common Carrier Bureau and the Chief of the appropriate Division of that Bureau and forthwith confirmed by petition filed and served in accordance with this section. (Section 1.4 does not apply to this Section 1.773(b))

* * * * * * *

F.C.C. 73R-114

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of JOHN P. FREW AND JULIA N. FREW, D.B.A. 3 J's BROADCASTING CO., ATHENS, TENN. For Construction Permit	Docket No. 17618 File No. BPH-5768

MEMORANDUM OPINION AND ORDER

(Adopted March 16, 1973; Released March 21, 1973)

BY THE REVIEW BOARD:

1. The Review Board has under consideration the Order of the Administrative Law Judge (FCC 73M-322, released March 9, 1973), in which he: (a) closed the record in this proceeding; (b) dismissed without prejudice the application of Athens Broadcasting Company, Inc. (Athens Broadcasting); (c) retained the application of 3 J's Broadcasting Company (3 J's) in hearing status; and (d) returned the proceeding to the Board for disposition. The only remaining issue is whether 3 J's "may reasonably be expected to exercise diligently that degree of licensee responsibility required by the operator of a broadcast facility and whether the public interest would be served by permitting the applicant to acquire an additional broadcast authorization."[1] The issue was added by the Board last September on the basis of evidence concerning the past broadcast record of 3 J's and its principals adduced under the standard comparative issue at the second hearing in this proceeding. Memorandum Opinion and Order, 37 FCC 2d 374, 25 RR 2d 483, released September 28, 1972.[2] There is no further evidence in the record pertaining to the issue,[3] and the Administrative Law Judge has made no conclusions concerning 3 J's' basic (as opposed to comparative) qualifications. Therefore, we are of the opinion that the most fair and expeditious procedure at this time would be to hold oral argument on the sole remaining issue. This will afford both 3 J's and the Broadcast Bureau an opportunity to address themselves to the question of 3 J's' basic qualifications.

[1] 3 J's is the licensee of standard broadcast Station WYXI, Athens, Tennessee.

[2] In his Cumulative Initial Decision (FCC 70D-32, released July 29, 1970), Administrative Law Judge Thomas H. Donahue concluded, in effect, that 3 J's' past broadcast record was "unusually poor" because the applicant-licensee had deviated substantially from "the norm of sound licenseeship". For this and other reasons, the Judge recommended a grant of the application of Athens Broadcasting. Oral argument on exceptions to the Cumulative Initial Decision, and to a Supplemental Initial Decision of Administrative Law Judge Ernest Nash (FCC 71D-32, released June 10, 1971), was held before a panel of the Review Board on April 18, 1972. The exceptions are still pending before the Board.

[3] An exhibit consisting of daily program logs for recent composite weeks was offered by 3 J's at the hearing held on February 20, 1973; however, the exhibit was rejected.

2. IT IS ORDERED, That oral argument before a panel of the Review Board IS SCHEDULED for April 3, 1973, commencing at 10 a.m., in Room 650, 1919 M Street, N.W., Washington, D.C.; that the parties who within five days after release of this Order file written notice of intention to participate in oral argument (Section 1.277(c) of the Rules) shall each be allowed 20 minutes for argument; and that the order of appearance shall be:

3 J's Broadcasting Company
Chief, Broadcast Bureau

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-324

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.606(b), TABLE OF ASSIGNMENTS, TELEVISION BROADCAST STATIONS (NASHVILLE, TENN.)	Docket No. 19617 RM-1944

REPORT AND ORDER

(Adopted March 21, 1973; Released March 27, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE DISSENTING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON DISSENTING; COMMISSIONER H. REX LEE CONCURRING IN THE RESULT.

1. We here consider the rule making to amend the Television Table of Assignments (Section 73.606(b) of the Commission's Rules and Regulations) to change the educational noncommercial reservation from Channel 2 to Channel 8 at Nashville, Tennessee, and to simultaneously modify the licenses of WSIX-TV (now Channel 8) and WDCN-TV (now Channel *2). This proceeding was instituted by a joint petition of the General Electric Broadcasting Company, Inc. (General Electric) and the Metropolitan Board of Education (The "Board") the respective licensees of these stations. A Notice of Proposed Rule Making was adopted October 18, 1972 (FCC 72-945). Timely comments were filed separately by the two petitioners supporting the rule making proposal. South Central Broadcasting Corporation, licensee of television Station WTVK, Channel 26 at Knoxville, Tennessee, and Mr. Ben Lewis, TAVC Company, Inc., Nashville, Tennessee, submitted comments by letter. WDXR-TV, Inc. (WDXR) licensee of UHF television Station WDXR-TV, Channel 29 Paducah, Kentucky, filed its opposition to the Notice of Proposed Rule Making. Reply comments were filed by General Electric and The Board directed to the WDXR opposition. WDXR also filed reply comments directed to comments of both General Electric and The Board.

2. The Notice was adopted by the Commission so that it might explore the proposal of the petitioners, particularly the claim that its adoption would bring significant improvement and enlargement of the educational television service in the Nashville metropolitan area: immediate financial assistance for the improvement of educational telecasting including the establishment of color television and continuing support for an educational operation which has been "chronically underfinanced". General Electric also claimed that the requested changes would enlarge the service area of WSIX-TV and make the operation of that station and the ABC Television Network, with which

it is affiliated, fully competitive with the low band VHF operations of the competing NBC and CBS affiliates.

3. The engineering aspects of the proposed substitution of channels has been addressed by all parties of interest. The Board submits that the Grade A service they would obtain by moving to Channel 8 would be greatly improved and that the Grade B service would be improved but to a lesser degree. Operating on Channel 2 the area within the proposed Grade A service for General Electric would be somewhat reduced but there would be a gain in the area encompassed by the Grade B contour. One engineering report included with the petition provides area figures for both grades of service on both channels based upon the standards set forth in Report R–6602 (a joint FCC/Industry method not yet incorporated in our rules). Although these figures show a lessened coverage area, they parallel the current rules in showing the relative potential for channels. The proponents assert that the shadowing effect on Channel 8 is greater than that on Channel 2 so if General Electric operated on Channel 2 it could only render more effective service in hilly areas surrounding Nashville. The population and area figures for both the present and proposed services are not significantly different than they would be if new facilities were to be installed and the licensees remained on their present channels.

4. The terms of the agreement between The Board and General Electric provide that the present WSIX–TV transmitter and associated equipment required for transmission on Channel 8 would be installed by and at the expense of General Electric. A new antenna and transmission line would be supplied by General Electric and installed on a heavy duty tower on which General Electric would also install its new antenna. Alternatively The Board would be given $107,000 in cash. General Electric also agrees to provide antenna terminal equipment or $18,000, microwave links or $25,000, transmitter terminal equipment or $15,000, two color cameras, film chain and projector, multiplexer, one color video tape recorder and all terminal equipment or $410,000, for a total cash consideration equivalent of $575,000.

5. In addition to the foregoing equipment or cash offered to The Board, General Electric would construct a heavy duty tower upon which to mount the Channel 2 and Channel 8 antenna and all other equipment necessary to the operation of WDCN–TV. Tower space and space for a main and auxiliary transmitter would be leased to The Board for 99 years at $1.00 per year. General Electric also agrees to operate and maintain the transmitting and other equipment for a period of 99 years at no cost to The Board and within five years from the date of the Commission's final orders to install a new transmitter for Channel 8 or at The Board's option pay The Board $180,000 cash. In turn, The Board agrees to assign its present transmitter and associated equipment plus antenna and transmission line to General Electric which would absorb the expenses involved in moving the equipment. The agreement contains a host of other details relating to items such as warranties, guarantees, indemnity, closing, etc., none of which are pertinent here.

6. The proponents submitted a report on the estimated financial gain to WSIX–TV resulting from its proposed move to Channel 2. This

report (dated November 1970) provided estimates based on three assumed heights above average terrain, but no change in height is involved in the channel exchange here proposed. Consequently, we do not need to consider this matter further.

7. Upon invitation by The Board, WLAC–TV, Inc., Channel 5, Nashville submitted comments on the proposed channel exchange. WLAC suggests that consideration be given to a study with regard to the Channel 8 site location of WDCN so to permit it to provide a greater degree of service as part of the statewide system of educational stations. WLAC also discusses the economic considerations of the channel exchange, pointing out that the offer of equipment, [the] location on a tall tower and transmitter operation for a period of years in itself recognizes that there is considerable value to be gained on Channel 2 as opposed to operating on Channel 8. In the total scheme of things, states WLAC, this is a relatively small, temporary one-time funding, affecting only the plant and equipment and which in no way solves the real heart of the problem, adequate, permanent funding of the station's operation so as to bring maximum educational service to the public. WLAC feel there would be a material loss to the educational effort by the proposed exchange of channels.

8. WDXR–TV, Inc., licensee of independent UHF Station WDXR–TV, Channel 29, Paducah, Kentucky, opposed the proposed channel exchange. The thrust of WDXR–TV's opposition is directed to the overlap of its Grade B contour by the Grade B contour of WSIX–TV operating on Channel 2 at 1349 feet HAAT as proposed, at 1850 feet HAAT as discussed in the estimated financial gain of WSIX–TV and at 2000 feet HAAT the maximum height permitted by FCC rules. As mentioned in paragraph six, these matters would warrant consideration only when such a proposal were before us. Overlap of 192 square miles, 555 square miles and 735 square miles with 3,140, 14,848 and 23,437 persons respectively it is said, would result. WDXR–TV further states that overlap would occur with Grade B contours of six other commercial UHF stations.[1] WDXR–TV also provides a map showing the overlap of WDCN–TV's Grade B contour by nine educational stations, five of which are in Kentucky, three in Tennessee and two in Alabama. The Grade B contours of six of the nine stations overlap the present Grade B contour of WDCN–TV. WDXR–TV avers that these educational stations essentially surround the existing WDCN–TV coverage area and leave no significant area which will be filed by improved coverage from WDCN–TV. WDXR–TV asserts that the Commission has refused to exchange high-band and low-band VHF channels in circumstances where there were demonstrable advantages such as the improvement of service and coverage, and it cites the comments of WDCN–TV's consulting engineers to the effect that each channel has an advantage but on balance are equivalent.

9. Reply comments by General Electric concede the equivalence of the two channels and acknowledges that the competitive advantage

[1] WRIP–TV, Channel 61, Chattanooga, Tennessee; WOWL–TV, Channel 15, Florence Alabama; WHNT–TV, Huntsville, Alabama; WAAY–TV, Channel 31, Huntsville, Alabama; WMSL–TV, Channel 48, Huntsville, Alabama and WEHT, Channel 25, Evansville, Indiana.

conceived for the operation of WSIX–TV is slight, long-range and debatable. When balanced against the financial undertakings of General Electric to improve the operation of WDCN–TV it contends that the advantage altogether disappears for some very considerable period of time, if not forever. General Electric asserts that WDCN–TV now operates a significantly substandard station; that its signal is poor and restricted; that its origination capacity is limited and its service suffers accordingly. General Electric submits that its proposed offer would solve each of these problems immediately, giving the public an excellent service and placing WDCN–TV in a far better position to find additional long range solutions to its funding problems. Thus, it is said, would enable WDCN–TV to improve its service to the public undistracted by at least some of the financial and technical limitations now characterizing its operation. Engineering data is provided by General Electric in an effort to show that WDXR–TV's overlap figures are not correct, and to show that taking into account co-channel interference to the WSIX–TV Grade B contour, the interference-free overlap area contains only 157 persons. This is based on the proposed height above average terrain of 1349 feet and used the method specified in the present FCC rules.

10. Reply comments by The Board contend that an overlap involving 157 persons is *de minimis* and that WDXR–TV has failed to come forward with the barest *prima facie* case of economic impact. In answer to WDXR–TV's statement that there is no need for improved educational coverage, The Board states that the channel exchange will provide a first Tennessee educational service to an in-state area of 1950 square miles with an approximate population of 85,000. The exchange would not only enlarge WDCN–TV's Grade B coverage but also its Grade A coverage from 2,855 square miles containing 608,103 persons to 7,716 square miles with 880,391 persons. According to a survey submitted by The Board, WDCN–TV's signal quality was noticeably inferior to WSIX–TV's signal. The Board expects the exchange and the improvement in WDCN–TV's facilities which would result to correct this problem.

11. In its reply comments WDXR–TV states that approval of the proposed channel exchange would create a bad precedent and disputes WDCN–TV's claims of "unique facts" since there are numerous television markets with a low band educational allocation and a high band commercial allocation each of which is a candidate for a similar proposal for exchange.

12. One of the two letters received in comment contains an objection to the exchange proposal if there is a reduction in the service of the ETV station. The other letter from Station WTVK Channel 26, Knoxville, Tennessee, outlines that station's history as a pioneer UHF station, supports the exchange of channels and gives notice of its intention to again apply for the use of Channel 8 in Knoxville with the expressed hope that the Commission will be prepared to demonstrate the same reasonableness and flexibility with respect to their request for help.[2]

[2] We express no view in this regard since no such proposal is before us.

CONCLUSIONS

13. The situation here presented is in many respects similar to that found in the exchange of channels in New Orleans, Louisiana, where the Commission authorized the ETV reservation on Channel 8 to be changed to Channel 12. In other respects the conditions differ. The ETV station in New Orleans on Channel 8 was underfinanced, poorly located, did not have color equipment and was experiencing delays in expansion. The exchange in channels provided immediate financial relief and an improved broadcasting facility serving a greater area and population with the capability to broadcast in color. Technically the exchange of channels in New Orleans involved two channels in the VHF high band whereas the exchange of channels in Nashville involves one channel in the low VHF band and one in the high VHF band. With equal antenna-power facilities the high-band exchange would have no effect on coverage as determined by the methods contained in the Commission's rules. In low band/high band exchange assuming equivalent antenna height and power a form of trade off would result. To compensate for the advantages inherent in signal propagation on the lower channels, the Commission permits higher channel operations to utilize power more than three times that permitted on the lower channels. The intention was to make the channels, high and low, essentially equivalent. Each, however, has its advantages and disadvantages. The low band user gains in the Grade B service which is slightly extended and the high band user because of higher power, in Grade A service area. In the Nashville case, the educational operation would benefit by a considerable improvement in picture quality in the densely populated area within the Grade A service area. In this instance it would considerably increase Grade B service operating on Channel 8 simply because of the increased height of the antenna. An increase in Grade B service area could also be accomplished on Channel 2 through the same means if it had funds available for the purpose. It has not been our policy to sanction exchanges between high band and low band television channels. Thus, in the Matter of Amending Section 73.606 to substitute Channel 2 for Channel 11 in Fort Worth, Texas, the Commission held that its general allocation policy of not changing individual assignments on the basis of claims of superior performance of one VHF channel over another would not be departed from except on a showing of exceptional circumstances. The Commission continues in its adherence to this policy. However, in this particular instance we are of the view that such exceptional circumstances do exist. In part these circumstances relate to the benefits which would flow to the Metropolitan Board of Education of Nashville and to the public it serves. WDCN–TV's service area would be enlarged (on channel 8) by virtue of an increase in antenna height. While this same enlargement in service area could be achieved on Channel 2, funds for this purpose have not become available. At essentially no cost to it the Board would be able to improve its signal and correct current reception problems as well as reach a sizeable additional in-state audience. WDCN–TV's ability to provide better and more flexible local programming would be greatly enhanced by the addition of improved

studio equipment which will include new color cameras and a video tape recorder. WDCN–TV's picture quality will be measurably improved and its operating costs will be substantially reduced. It is reasonable to expect that these benefits would give immediate financial relief to WDCN–TV, thereby enabling it to concentrate its efforts toward a better educational and instructional service to the public not only of Nashville but to the mid-section of Tennessee as a part of the State educational system. While it could be argued that these benefits are only short-term, the fact remains that without these benefits WDCN–TV could continue for years as an underfinanced operation incapable of attracting financial assistance because of an inferior service.

14. Although General Electric has agreed to pay a substantial amount to The Board, this does not establish that in non-monetary terms The Board or the public has lost. General Electric's advantage (and hence its willingness to compensate The Board) flows from the gain in Grade B coverage on Channel 2. State boundaries are of no moment to General Electric but the area servable by Channel 2 but not 8 lies in good measure outside Tennessee. Thus The Board has little need for this extension of coverage, for which it has no funds of its own in any event. Because of the coverage gain made possible by the exchange, The Board would much extend its coverage where it is needed, in state, as part of the state-wide system. While high and low band VHF channels are equivalent, there are differences between them and the most effective utilization of them both is furthered by this proposal. In the Texas case cited earlier, such was not the case and the petitioner there simply preferred the low band channel because of the slightly larger Grade B coverage it would have provided. To accept this would have brought endless channel changes wherever the situation arose but our action here will have no such effect.

15. Concern about UHF impact has been expressed but the showings do not suggest that a real problem exists on this score. Using the present curves,[3] the overlap by General Electric's of WDXR–TV's Grade B contour would affect only 3,140 persons in the interference-free areas of both stations. The impact of such overlap, occurring at the periphery of WDXR–TV's Grade B contour, is clearly minimal. As such it poses no impediment to favorable action on this proposal.[4] Slight increases in overlap to five other stations has not caused them great concern nor does it us. The effects if not miniscule appear minor. In terms of increase in coverage by the educational station, contrary to one of the arguments, it comes in significant part in just those areas where it is needed. A first Tennessee educational service would be extended greatly and the presence of out of state educational signals is of highly limited importance. In sum, we find that the proposal before us is meritorious and it shall be ordered into effect.

16. In view of the foregoing, IT IS ORDERED, That, effective May 3, 1973, pursuant to authority contained in Sections 4(i), 303, and

[3] Using those curves in R–6603 there would be no overlap with WDXR–TV at all.
[4] It has not been our practice to utilize the concept of an interference-free contour in resolving cases of alleged UHF impact. We therefore have not based our decision on the figure of 157 mentioned by General Electric, nor, as indicated above, need we.

307(b) of the Communications Act of 1934, as amended, the Television Table of Assignments (Section 73.606(b) of the Commission's Rules and Regulations) IS AMENDED to read as follows for the community indicated:

City:	*Channel No.*
Nashville, Tenn	2–, 4+, 5, *8+, 17, 30, *42

17. IT IS FURTHER ORDERED, That, effective May 3, 1973, and pursuant to Section 316(a) of the Communications Act of 1934, as amended, the outstanding license held by the Metropolitan Board of Education for Station WDCN–TV, Nashville, Tennessee, IS MODIFIED to specify operation on Channel *8 in lieu of Channel *2 subject to the following conditions:

(a) The licensee shall inform the Commission in writing no later than April 19, 1973, of its acceptance of this modification.

(b) The licensee shall submit to the Commission by June 4, 1973, all necessary information complying with the applicable technical rules for modification of authorization to cover the operation of Station WDCN–TV on Channel *8 at Nashville, Tennessee, with the facilities specified in its "Petition for Rule Making and the Issuance of Modified Authorization", filed jointly with the General Electric Broadcasting Company, Inc., in this proceeding.

(c) The licensee may continue to operate on Channel 2 under its outstanding authorization until it is ready to operate on the new frequency. Ten days prior to commencing operation on Channel *8, the licensee shall submit the same measurement data normally required in an application for a television broadcast station license.

(d) The Metropolitan Board of Education shall not commence operation on Channel *8 until the Commission specifically authorizes it to do so.

18. IT IS FURTHER ORDERED, That, effective May 3, 1973, and pursuant to Section 316(a) of the Communications Act of 1934, as amended, the outstanding license held by the General Electric Broadcasting Company, Inc., for Station WSIX–TV, Nashville, Tennessee, IS MODIFIED to specify operation on Channel 2 in lieu of Channel 8 subject to the following conditions:

(a) The licensee shall inform the Commission in writing no later than April 19, 1973, of its acceptance of this modification.

(b) The licensee shall submit to the Commission by June 4, 1973, all necessary information complying with the applicable technical rules for modification of authorization to cover the operation of Station WSIX–TV on Channel 2 at Nashville, Tennessee, with the facilities specified in its "Petition for Rule Making and the Issuance of Modified Authorization", filed jointly with the Metropolitan Board of Education, in this proceeding.

(c) The licensee may continue to operate on Channel 8 under its outstanding authorization until it is ready to operate on the new frequency. Ten days prior to commencing operation on Channel 2, the licensee shall submit the same measurement data normally required in an application for a television broadcast station license.

(d) The General Electric Broadcasting Company, Inc., shall not commence operation on Channel 2 until the Commission specifically authorizes it to do so.

19. IT IS FURTHER ORDERED, That, the change to operation on Channel *8 by Station WDCN–TV, and to operation on Channel 2 by Station WSIX–TV, with the facilities specified in the aforementioned petition, shall be effected simultaneously, or, if not effected simultaneously, shall be effected by one station only if the other station has gone off the air for a period prior to changing frequency pursuant to Commission authorization.

20. IT IS FURTHER ORDERED, That, the Opposition pleading filed herein IS DENIED.

21. IT IS FURTHER ORDERED, That, this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

I dissent to the action taken by the majority.

It is clear that the benefits that accrue to the educational station in Nashville are desirable in that they are immediate.

However, I do not feel prepared to state that the overlap of Station WSIX's new service with that of UHF Station WDXR is minimal.

I feel that WDXR is entitled to an evidentiary hearing on the impact of this overlap in order that the Commission could properly assess the public interest.

F.C.C. 73R–127

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
OLVIE E. SISK, IVOUS T. SISK, AND JOEL E. CAMP D.B.A. TRI-COUNTY BROADCASTING CO., EUPORA, MISS.	Docket No. 19026 File No. BP–18016
RALPH MATHIS AND AUBREY FREEMAN, D.B.A. RADIO TUPELO, TUPELO, MISS.	Docket No. 19027 File No. BP–18220
For Construction Permits	

APPEARANCES

R. Russell Eagan, *Theodore A. Shmanda* and *Robert A. Beizer*, on behalf of Tri County Broadcasting Company; *Eugene F. Mullin* and *J. Parker Connor*, on behalf of Radio Tupelo; and *Charles W. Kelley*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted March 21, 1973; Released March 23, 1973)

BY THE REVIEW BOARD: BERKEMEYER, NELSON AND PINCOCK.

1. This proceeding involves the mutually exclusive applications of Olvie E. Sisk, Ivous T. Sisk and Jack E. Camp, d/b as Tri County Broadcasting Company (Tri County), and Ralph Mathis and Aubrey Freeman, d/b as Radio Tupelo (Radio Tupelo) for new standard broadcast stations at Eupora, Mississippi, and Tupelo, Mississippi, respectively. Both applicants proposed to operate on 710 kHz; Tri County proposes a nondirectional operation with 500 watts, and Radio Tupelo a directional operation with 5 kw power. On October 2, 1970, the Commission released a Memorandum Opinion and Order (35 FR 15864) designating the applications for hearing on an areas and populations issue, a financial issue against Radio Tupelo, a *Suburban* issue against Tri County, and a Section 307(b) issue. By Memorandum Opinion and Order, released March 4, 1971, the Review Board added an issue to determine whether the antenna system proposed by Tri County will be able to achieve the minimum efficiency requirement of Section 73.189(b)(2)(ii) of the Commission's Rules. 27 FCC 2d 1013, 21 RR 2d 380. In an Initial Decision, FCC 71D–87, released November 12, 1971, Administrative Law Judge David I. Kraushaar concluded that both applicants have met the qualifying issues specified against them and recommended that Tri County's application be granted under the 307(b) issue. In doing so, the Judge was following the recommendation of the Commission's Broadcast Bureau. The Judge reasoned that there is a "substantially greater 'need' . . . for a first local broad-

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cast outlet for self-expression in Eupora [1970 population 1,792] and Webster County [1970 population 10,047] than for a 3rd, or 4th, standard broadcast station in Tupelo [1970 population 20,471] (with operating FM and TV stations already allocated to it)". It was further held that because there are "multiple 'reception' services . . . available to practically all areas either applicant will serve . . ., Radio Tupelo merits only a slight or moderate, but not decisive, preference over Tri County by virtue of its [proposal to serve substantially more persons in a much greater area]."

2. The proceeding is now before the Review Board on exceptions filed by Radio Tupelo. Tri County and the Broadcast Bureau support the Initial Decision. Oral argument was held before a panel of the Review Board on February 20, 1973. We have reviewed the Initial Decision in light of Radio Tupelo's exceptions, Tri County's reply, the arguments of the parties, and our examination of the record. We find the Administrative Law Judge's findings of fact to be substantially accurate and his conclusions persuasive. Furthermore, the Presiding Judge has, in our opinion, adequately dealth with the arguments raised in Radio Tupelo's exceptions; no useful purpose would be served by further discussion here. Therefore, except as modified in the rulings on exceptions contained in the attached Appendix, and upon a finding that the public interest would be served thereby, Judge Kraushaar's Initial Decision is adopted.

3. Accordingly, IT IS ORDERED, That the application of Olvie E. Sisk, Ivous T. Sisk and Joel E. Camp, d/b as Tri County Broadcasting Company (BP–18016) for a construction permit for a new standard broadcast station at Eupora, Mississippi, IS GRANTED, and the application of Ralph Mathis and Aubrey Freeman, d/b as Radio Tupelo (BP–18220), IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
JOSEPH N. NELSON, *Member, Review Board.*

APPENDIX

RULINGS ON THE EXCEPTIONS OF RADIO TUPELO

Exception No.	*Ruling*
1,2	*Granted* to the extent that the contested findings in paragraphs 6 and 8 of the Initial Decision are without substantial factual basis in the record; *denied* in all other respects because other than the statements excepted to, the findings of the Administrative Law Judge with respect to Eupora adequately and accurately reflect the record.
3,10	*Denied.* The *possibility* of utilization of other available frequencies is mere speculation; such frequencies may be utilized elsewhere or not at all. It is existing facilities that must be considered in determining the need for a local outlet for self-expression. *Meredith Colon Johnston*, 33 FCC 2d 324, 23 RR 2d 671 (1972), affirmed FCC 73–165, released February 21, 1973. *Cf. The Riverside Church in the City of New York*, FCC 58–559, 17 RR 332.

RULINGS ON THE EXCEPTIONS OF RADIO TUPELO—Continued

Exception No.	*Ruling*
4	*Denied.* The findings of the Administrative Law Judge adequately and accurately reflect the record evidence.
5	*Granted.* The typographical error in paragraph 16 of the Initial Decision is corrected.
6,8	*Denied.* Radio Tupelo has presented no evidence to controvert Tri County's showing that it did interview community leaders in Eupora for its original survey and that it drew up a list of community needs based on those interviews. Nor did Radio Tupelo impeach testimony to that effect by Tri County principal, Olvie Sisk. See Tr. 42. Thus, the inferences and speculations of Radio Tupelo concerning Tri County's community surveys are insufficient to establish bad faith or disregard of Commission policy. Furthermore, although Tri County's program format is the same as that originally submited, the applicant has demonstrated on the record that its specific programming proposals will meet the ascertained needs and problems of the community. The Review Board is of the view, therefore, that once Tri County carried out its supplementary surveys, it met its burden with respect to the *Suburban* issue.
7,9,14	*Denied.* The Presiding Judge's Memorandum Opinion and Order, FCC 71M–466, released March 29, 1971, is affirmed. The Commission has permitted utilization of antenna systems with specifications other than those stated in Rule 73.189(b)(2)(ii), so long as minimum efficiency requirements are met. This was noted in, *e.g.*, *The Edgefield-Saluda Radio Co.* (*WJES*), 5 FCC 2d 148, 152, 8 RR 2d 611, 618 (1966). Since Tri County had reasonably concluded that its ground system would comply with the Commission's Rules, addition of the disqualifying issue by the Review Board (see paragraph 1 of this Decision) was the first notice that the subject amendment was necessary; therefore, the necessity to amend could not reasonably have been foreseen prior to designation. Moreover, as noted by the Broadcast Bureau, the amendment was minimal in nature, it was filed with due diligence; and it did not result in prejudice, a comparative advantage, addition of new parties or issues, or delay. The Presiding Judge therefore did not err when he accepted the amendment. *Cf. Ottawa Broadcasting Corp.* (*WJBL*), FCC 64R–382, 3 RR 2d 575. Compare *Charles W. Hurt*, 21 FCC 2d 827, 18 RR 2d 533 (1970), where the circumstances which triggered the proffered amendment were a matter of public record and could and should have been foreseen well prior to designation.

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RULINGS ON THE EXCEPTIONS OF RADIO TUPELO—Continued

Exception No.	*Ruling*
11	*Denied.* Resolution of the 307(b) issue encompasses comparative consideration of the need of the respective service areas for a new reception service and the need of the specified communities for a new transmission facility. *Kent-Ravenna Broadcasting Co.*, FCC 61–1350, 22 RR 605; *Meredith Colon Johnston, supra.* While the Radio Tupelo proposal is more efficient because of service to greater numbers of persons, such service must be substantially discounted where, as here, those persons are already well served. *Meredith Colon Johnston, supra; Dennis A. and Willard D. Sleighter* (*WWDS*), 6 FCC 2d 662, 9 RR 2d 320 (1967). Furthermore, although the indicia of need of the smaller community are not as broad in scope as comparable activities of the larger city, Eupora's need for a first local outlet, as compared to Tupelo's need for a fourth (or fifth) aural broadcast service is not diminished thereby. See *Service Broadcasting Corp.*, 36 FCC 1085, 2 RR 2d 539 (1964), review denied FCC 64–813, September 2, 1964. The decisions cited by Radio Tupelo in its brief were predicated on facts not present in the instant case. The Presiding Judge, therefore, correctly concluded that the need of Eupora for a first outlet for local self-expression outweighs any claimed need of Tupelo for an additional such outlet and properly granted a substantial, decisive preference to Tri County under the transmission aspect of this issue.
12	*Denied* for the reasons stated in our rulings on Exceptions 3, 10 and 11, *supra.*
13	*Denied* for the reasons stated in our rulings on Exceptions 3, 6, 7, 8, 9, 10 and 11, *supra.*
15	*Denied.* The Administrative Law Judge did not abuse his discretion. See Section 1.301 of the Commission's Rules.
16–21	*Denied.* In none of the rulings excepted to did the Administrative Law Judge abuse his discretion.
22	*Denied.* The Presiding Judge properly concluded that both applicants have met the qualifying issues specified against them and that the application of Tri County should be granted under the 307(b) issue.

F.C.C. 71D-87

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
OLVIE E. SISK, IVOUS T. SISK, AND JOEL E. CAMP, D.B.A. TRI-COUNTY BROADCASTING CO., EUPORA, MISS.	Docket No. 19026 File No. BP-18016
RALPH MATHIS AND AUBREY FREEMAN, D.B.A. RADIO TUPELO, TUPELO, MISS.	Docket No. 19027 File No. BP-18220
For Construction Permits	

APPEARANCES

On behalf of Olvie E. Sisk, Ivous T. Sisk and Joel E. Camp, d/b as Tri County Broadcasting Company, Messrs. *R. Russell Eagan* and *Theodore A. Shmanda* (Kirkland, Ellis, Hodson, Chaffetz and Rowe, Esqs.); on behalf of Ralph Mathis and Aubrey Freeman, d/b as Radio Tupelo. Messrs. *Eugene F. Mullin* and *J. Parker Connor* (Mullin, Connor and Rhyne, Esqs.); and on behalf of the Broadcast Bureau, Federal Communications Commission, Mr. *Charles W. Kelley*.

INITIAL DECISION OF HEARING EXAMINER DAVID I. KRAUSHAAR

(Issued November 11, 1971; Released November 12, 1971)

PRELIMINARY STATEMENT

1. The applications of Tri County Broadcasting Company and Radio Tupelo for standard broadcast facilities in Eupora and Tupelo, Mississippi, respectively, are mutually exclusive in that simultaneous operation of the stations as proposed by these applicants would result in mutually destructive interference under the Commission's Rules (Section 73.37). For this reason alone, the Commission would have been required to consolidate the applications and designate them for hearing which, of course, it did by Memorandum Opinion and Order released October 2, 1970 (FCC 70-1038). The Commission's Memorandum Opinion, however, besides specifying standard Section 307(b) comparative issues, pointed out that Radio Tupelo (according to its application) would need $117,690.00 to construct and operate its proposed station for one year without reliance on revenues and that it appeared to be $35,690.00 short of this amount, and also that recent balance sheets of the two partners failed to disclose adequate liquid assets to satisfy their individual loan commitments. Consequently, the Commission framed an issue concerning Radio Tupelo's financial qualifications. The Commission's Memorandum Opinion also observed that applicant Tri County had "failed to submit sufficient information [with its application] to enable us to determine whether a representa-

tive cross-section of community leaders and the general public was consulted". Accordingly, a so-called *Suburban* issue was framed against applicant Tri County. The Order imposed the following condition upon applicant Radio Tupelo in the event its application might be granted:

> Program tests will not be authorized until the permittee has shown that Ralph Mathis and Aubrey Freeman have divested all interest in, and severed all connections with the licensee of station WCPC, Houston, Mississippi.

2. The hearing in this proceeding was scheduled originally to convene December 14, 1970 (FCC 70M–1348). A prehearing conference was held November 17, 1970, during which, with the Examiner's approval, a date of February 16, 1971 was agreed upon as a new date for commencing the hearing (FCC 70M–1589). By Order released December 4, 1970 (FCC 70M–1655), a financial qualifications amendment to Radio Tupelo's application was accepted. By further Order released December 21, 1970 (FCC 70M–1731), the Examiner granted in part a petition by Tri County for leave to amend its application in order to reflect (a) the availability to it of sufficient land for that applicant's proposed transmitter; (b) up-to-date financial data submitted by it; and (c) changes in the petitioner's proposed ground system. The amendment insofar as it proposed changes in Tri County's ground system was rejected. By Memorandum Opinion and Order released February 2, 1971 (FCC 71R–37), the Commission's Review Board denied Tri County's petition to delete or enlarge the so-called *Suburban* issue. In the meantime, by Order released February 16, 1971 (FCC 71M–249), the Hearing Examiner granted a further petition of Tri County to amend its application and accepted the amendment tendered therewith. And by Order released February 19, 1971 (FCC 71M–270) he granted a petition by Radio Tupelo for leave to amend its application in order to reflect a substitute loan commitment, from the Bank of Mantee, in lieu of one from First Citizens National Bank which had expired. Both the latter petitions to amend had been unopposed. Finally, by Memorandum Opinion and Order released March 4, 1971 (FCC 71R–74), the Commission's Review Board added the following issue against Tri County:[1]

> **To determine whether the antenna system proposed by Tri County Broadcasting Company will be able to achieve the minimum efficiency requirement (175mv/m/kw) of Section 73.189(b)(2)(ii) of the Commission's Rules.**

The burdens of proceeding with the introduction of evidence and proof under the new issue were placed on Tri County. As thus amended, the issues applicable in this proceeding are:

1. To determine the areas and populations which would receive primary service from the proposed operations and the availability of other primary aural service to such areas and populations (1 mv/m or greater in the case of FM).

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[1] The Review Board in the same ruling denied requests of Radio Tupelo for enlargement of the issues against Tri County questioning the availability of sufficient land to the latter to effectuate its proposals, Tri County's financial qualifications, and the adequacy of Tri County's proposed staff.

2. To determine whether Radio Tupelo is financially qualified to construct and operate its proposed station.

3. To determine the efforts made by Tri County Broadcasting Company to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

4. To determine, in the light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

5. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if either, of the applications should be granted.

6. To determine whether the antenna system proposed by Tri County Broadcasting Company will be able to achieve the minimum efficiency requirement (175 mv/m/kw) of Section 73.189(b)(2)(ii) of the Commission's Rules.

3. On March 29, 1971, an Order was released (FCC 71M–466), granting a further petition by Tri County, this time over the strenuous opposition of Radio Tupelo, for leave to amend Tri County's application in order to substitute a revised "Figure 5" to the engineering portion of the application (*cf.* Order released December 21, 1970, *supra*, which rejected a similar amendment), but subject to the specified condition that Tri County's engineering coverage is to be considered to be limited by being predicated on the effective field of 175 mv/m per kw as specified in its engineering Exhibit 1, and to a further condition as specified in "Comments" to the Petition filed by the Commission's Broadcast Bureau. See *Dover Broadcasting Company*, 31 FCC 518, 523 (1961) and para. 27, *infra*. By further Order released April 21, 1971 (FCC 71M–612), the Examiner denied Radio Tupelo's request for permission, pursuant to Rule 1.301(b), to file an interlocutory appeal from this ruling.

4. Hearing sessions were held in this proceeding on February 16, 17, and 23, 1971. However, due to an unexpected engineering question that arose during the course of these sessions, and the pendency at that time of interlocutory pleadings before the Review Board, all parties agreed, with the approval of the Hearing Examiner, that the hearing should be continued until June 14th, for the presentation of further evidence (T. 211, 212). An additional session was held June 14 and the record was thereupon closed. On August 25, 1971, an Order was released (FCC 71M–1384) granting a joint motion by the applicants for correction of the hearing transcripts. But on the parties' representation that a portion of the testimony may not have been transcribed by the Commission's reporting firm, the Examiner, by Order released September 2, 1971 (FCC 71M–1423), reopened the record and scheduled a conference to consider the matter. The problem was resolved, finally, by the parties' agreement to the inclusion in the hearing record of Radio Tupelo Ex. 12, consisting of interrogatories of the Commission's Broadcast Bureau directed to Messrs. Mathis and Freeman and their sworn replies thereto. See Order released September 15, 1971 (FCC 71M–1509) and Order released October 15, 1971 (FCC 71M–1650). By the last cited Order the record was again closed. Proposed findings were filed by October 29, by all parties, and replies by the applicants were submitted by the November 8, 1971 deadline.

Findings of Fact

A. *The Section 307(b) Comparative Issues*

5. *Eupora, Mississippi—The Tri County Proposal.* Tri County is seeking authority to construct a new Class II standard broadcast station in Eupora, Mississippi, to operate on the frequency 710 kHz, with 500 watts power, daytime only.

6. Eupora, Mississippi, has a 1970 U.S. Census population of 1,792 (1,468 in 1960). It is located in Webster County (1970 U.S. Census population 10,047) and is that county's largest community, although it is not the county seat. Many of the County and State offices, however, are located in Eupora and a large portion of the County functions are carried on there. Eupora is located in the north central part of the state, about 55 miles south-southwest of Tupelo. It is not a part of any urbanized area. There are no broadcast facilities in the community or in Webster County.

7. The Webster County Hospital is located in Eupora. The hospital has 55 beds and is serviced by three medical doctors and two dentists, Eupora has a county library, an airport, four full-time policemen, and an 18-member volunteer fire department. Eupora has 868 pupils in grades 1–6 and 788 pupils enrolled in grades 7–12. The town is governed by a Mayor-Alderman type of government, while a Board of Supervisors governs Webster County.

8. Eupora has the usual retail outlets one would expect to find in a community of its size. It has no daily newspaper and but one weekly paper which is published there, with a circulation of about 3,000.

9. Webster County is an agricultural area with major crops including cotton, corn and soybeans.

10. Using an assumed effective field of 175 mv/m per kilowatt, or 124 mv/m for the proposed 500 watts power, in conjunction with ground conductivity values taken from Figure M–3 of the Rules, the proposed coverage is as follows:

Contour (mv/m.)	Population [1]	Area (square miles)
2.0	16,791	730
0.5	81,185	3,888

[1] Population figures herein are based on advance report of final population counts in 1970 U.S. Census of Population and preliminary minor civil division map.

The proposed primary service area is entirely rural including the community of Eupora.

11. The following tabulation lists the populations and areas within the proposed Tri County primary service area that now receive from 1 to 5 services: [2]

[2] Proof-of-performance data and interference-free contours were used to delineate the various areas.

Number of services	Population	Area (square miles)
AM		
1	63	3.5
2	2,560	141.5
3	8,952	331.0
4	7,844	319.0
5	11,504	451.0
Aural		
1 (i.e., both AM & FM)	47	2.8
2	2,083	102.2
3	3,389	119.0
4	6,418	258.0
5	8,564	303.0

12. Four standard broadcast stations provide AM primary service (0.5 mv/m or greater) to the community of Eupora, namely, WHBQ, Memphis, Tennessee (125 miles distant), WCPC, Houston, Mississippi (29 miles), WKOR and WSSO,[3] Starkville, Mississippi (27 miles). In addition, Station WCPC–FM, Houston, Mississippi provides 1.0 mv/m FM service to the community.

13. *Tupelo, Mississippi—The Radio Tupelo Proposal.* Radio Tupelo is seeking authority to establish a new Class II standard broadcast station in Tupelo, Mississippi, to operate on the frequency 710 kHz with 5 kilowatts power, daytime only, employing a directional antenna. As indicated above (para. 6), Tupelo is approximately 55 miles north-northeast of Eupora, Mississippi.

14. Tupelo, Mississippi, population 20,471, is the county seat of Lee County (pop. 46,148) located in the northeastern part of the state. It is not a part of any urbanized area. The community has two AM stations, namely, WELO (580 kHz, 500 W, 1 Kw–LS, DA–2, U, III) and WTUP (1490 kHz, 250 W, 1 Kw–LS, U, IV);[4] one FM station, WELO–FM (98.5 MHz, 100 Kw, 380 ft. C); and one TV station WTWV (Ch. 9, 27.2 Kw, 520 ft.).

15. Tupelo is an incorporated city governed by an elected Mayor and Board of Aldermen. According to the 1970 Commercial Atlas and Marketing Guide, published by Rand McNally & Co., it is one of the 12 "principal Business Centers" in the state of Mississippi, a "Basic Trading Center" on which is based a "Basic Trading Area" centered on Tupelo which consists of six counties, one of the 494 "Basic Trading Areas" in the country, and part of the "Major Trading Area" based on Memphis.

16. Tupelo is the site of the Northern Mississippi Community Hospital, a number of civic organizations (including Civitan, Rotary, Lions, Pilots, Exchange Club), 40 churches (including all major denominations), eight city parks and recreation areas, a National Guard Armory, a State Technical and Vocational School, and a municipal airport. A daily newspaper, the *Tupelo Daily Journal*, has been published in the city for more than 90 years. Tupelo has two high schools, two junior highs, five elementary schools and a day

[3] Based on measurements on Station WKOR in the direction of 277 degrees true and on Station WSSO in the direction of 283 degrees true.
[4] See footnote 6, *infra*.

school for mentally retarded children. The public school system employs 246 teachers, ten principals and vice-principals, and eight directors and supervisors. The Vocational Rehabilitation Division of the Mississippi State Department of Education maintains one of its sheltered workshops in Tupelo, providing job training to the handicapped. The Lee County Library is located in Tupelo. Industries in the Tupelo, Mississippi, area (including Tupelo, Verona, Baldwyn, Guntown, Sherman, Nettleton, Plantersville and Sattillo) include fifty-five companies which employ 25 or more persons.

17. Using radiation values from the proposed directional antenna pattern in conjunction with ground conductivity values taken from Figure M–3 of the Rules except in the directions of 90, 171, 191, 211, 232, 252, and 287 degrees true where conductivity values obtained from field intensity measurements on Station WELO at Tupelo were employed, the proposed coverage is as follows:

Contour (mv/m)	Population	Area (square miles)
2.0	219,386	3,612
0.5	366,393	10,610

18. The following populations and areas within the proposed Radio Tupelo primary service area presently receive from 1 to 5 services: [5]

Number of services	Population	Area (square miles)
1 AM:		
Rural	63	3.5
Houston, Miss	2,720	2.8
Total	2,783	6.3
2 AM:		
Rural	2,240	142.0
Amory, Miss	2,720	7.0
Columbus Base, Miss. (U)	4,074	4.2
Aberdeen, Miss. (47 percent)	2,894	3.1
Total	16,444	156.3
3 AM:		
Rural	21,268	1,144.6
Pontotoc, Miss	3,453	7.0
Fulton, Miss	2,899	4.2
Okolona, Miss	3,002	4.2
Aberdeen, Miss. (53 percent)	3,263	3.5
West Point, Miss. (20 percent)	1,743	1.4
Total	35,628	1,164.9
4 AM:		
Rural	27,316	1,516.3
Tupelo, Miss	20,471	27.8
West Point, Miss. (80 percent)	6,971	6.6
Columbus, Miss	25,795	11.1
Starkville, Miss	11,369	7.0
State College, Miss. (U)	4,595	2.8
Total	96,517	1,571.6

[5] Proof-of-performance data and interference-free contours were employed to delineate the areas tabulated above. As requested by the Broadcast Bureau, it is officially noticed that the Commission granted a construction permit on September 1, 1971 to Town and Country Broadcasting Company for a new standard broadcast station in Tupelo, Mississippi, to operate on the frequency 1060 kHz with 250 watts power, daytime only.

Number of services	Population	Area (square miles)
5 AM:		
Rural	35,048	1,469.4
Urban		
Total	35,048	1,469.4
1 Aural (i.e., both AM & FM):		
Rural	47	2.8
Urban		
Total	47	2.8
2 Aural:		
Rural	1,678	112.8
Urban		
Total	1,678	112.8
3 Aural:		
Rural	7,836	391.3
Houston, Miss	2,720	2.8
Aberdeen, Miss. (20 percent)	1,231	1.3
Total	11,787	395.4
4 Aural:		
Rural	22,938	1,246.2
Fulton, Miss	2,899	4.2
Amory, Miss	7,236	7.0
Columbus Base, Miss (U)	4,074	4.2
West Point, Miss. (20 percent)	1,743	1.4
Aberdeen, Miss. (27 percent)	1,662	1.8
Total	40,552	1,264.8
5 Aural:		
Rural	22,171	1,297.1
Okolona, Miss	3,002	4.2
Aberdeen, Miss. (53 percent)	3,264	3.5
West Point, Miss. (80 percent)	6,971	6.6
Columbus, Miss	21,926	9.4
Total	57,334	1,320.8

19. The community of Tupelo, Mississippi presently receives AM daytime primary service (2.0 mv/m or greater) from Stations WELO and WTUP in Tupelo, from WCPC in Houston, Mississippi, and from WSEL in Pontotoc, Mississippi.[6] It receives FM service (1.0 mv/m or greater) from Stations WCPC–FM in Houston, WSEL–FM in Pontotoc, and WELO–FM in Tupelo.

20. As noted above, as well as in paragraph 16 of the Broadcast Bureau's proposed findings, the communities of Eupora and Tupelo are about 55 miles apart and the applicants' proposed transmitter sites are approximately 60 miles apart. In other words, the proximity of the two proposed stations to one another results in overlap by Radio Tupelo's proposed 0.5 mv/m contour of approximately 60% of the area within Tri County's proposed 0.5 mv/m contour. And conversely, Tri County's proposed 0.5 mv/m contour overlaps about 25% of the area within the proposed 0.5 mv/m contour of Radio Tupelo.[7] It also appears that Radio Tupelo would provide primary service (0.5 mv/m or greater) to all of the community of Eupora and to all of Webster County, whereas neither the proposed 0.5 mv/m nor the pro-

[6] See footnote 6, *supra*. A construction permit for a third AM station to be located in Tupelo has been issued.

[7] While there does appear to be slight 2.0 mv/m overlap there are no urban areas located in such overlap area.

posed 2.0 mv/m contour of Tri County will reach the community of Tupelo.

B. *The Suburban or "Ascertainment" of Needs—Issue Against Tri County*

21. As Tri County has indicated (Tri County Proposed Findings, para. 27), the Commission found in paragraph 5 of its Memorandum Opinion and Order designating the applications for hearing that Tri County had not submitted sufficient data with its application to enable the Commission to determine whether it had consulted a representative cross-section of community leaders and the general public in order to ascertain community needs and problems. The evidence of record compiled during the hearing, however, now contains an extensive and detailed presentation of facts pertinent to the *Suburban* issue framed by the Commission herein. The Examiner, indeed, is satisfied that paragraphs 29–41, inclusive, of the applicant's proposed findings accurately and completely portray the record data. In order not to burden this Initial Decision with unnecessary prolixity, these paragraphs are adopted and deemed to be incorporated herein by reference, only the highlights thereof being summarized hereinafter.

22. In order to ascertain the community needs and interests of the area to be served by the proposed station, a total of 558 persons were consulted in January of 1970 and during the period between December of 1970 and January of 1971, by principals of the applicant or by other persons under their direction and supervision. Each of the 558 persons consulted was identified as to name, address, race, occupation and civic, religious and similar affiliations. Each of the 558 persons consulted was asked to set forth his views as to the significant needs or problems of his community. Completed questionnaire sheets were retained for each of the 558 persons consulted and all but 20 of them gave views which were recorded in the interview sheets. Four of these twenty stated their opinions as to what constituted the significant needs or problems of the community, but asked that the information not be recorded and not be attributed to them.

23. Of the 558 individuals who were contacted, 135 were community leaders and 423 were members of the general public. Mr. Sisk, a 45% partner, personally interviewed some 33 community leaders and his wife, also a 45% partner, personally interviewed another 21. Paragraph 32 of the applicant's proposed findings appears to reflect in accurate detail how many of the contacts were made by Mr. and Mrs. Sisk together and separately and how many by Mr. Camp, the third partner in the applicant, and by Mr. Dozier, an employee of a radio station in Fulton, Mississippi (WFTO) in which the Sisks have a 50% interest. In terms of the occupations of those contacted, the evidence reflects that some 38 community leaders contacted were connected with government, 16 with education, 15 with religion, 3 with agriculture, 18 with business, 17 with racial and ethnic groups, 6 with labor and 11 with professions. The evidence also shows that the 558 persons contacted reside within 12 or 14 counties within the applicant's proposed 0.5 mv/m contour and that 67.2% of the contacts were white and 32.8% were black.

24. Tri County's partners, the evidence demonstrates, have evaluated that data obtained from the 558 consultations in relation to the significant community needs and interests of the area to be served. The evaluation disclosed to them the following community needs and interests which they regarded as significant (Tri County Proposed Findings, para. 36):

a. The number one need and the main interest of individuals in the proposed service area was the need for more industry.

b. The next major problem was the related need for more and better paying jobs for men and women.

c. The third most significant need was for more and better roads.

d. The next most significant problem was the need for more doctors, dentists and medical facilities for the area.

e. The next most significant need was that for better understanding between the races. Members of both races stated they felt more industry, more jobs, and higher paying jobs would help bring about a better understanding. The members of the black race expressed a need for better housing, for more telephones and for community water and sewerage facilities.

f. Additional significant problems consisted of the needs for recreational centers for black and white young people, for a program of school construction, for improvement in housing standards, for re-evaluation of the assessment values of property, for better and extended welfare programs, for better telephone service, for improved garbage service, for extension of present water and sewer facilities, for additional sidewalks and streets and improvement of some existing streets and sidewalks, for new courthouses in Webster and Choctaw Counties, for free dental and eye care for the needy and for increasing the salary of teachers in order to attract and keep qualified teachers.

25. Tri County proposes to meet the above-ascertained community needs and interests by carrying the following broadcast matter:

a. With respect to the first significant need listed above, the proposed station will be used to publicize the significance of this need. It is intended, by means of public service announcements, to make known to the public the availability of jobs open in the area and to promote and encourage local industry to hire local people. Programs proposed that are entitled "Know Your Government" and "Viewpoint" are to be used as vehicles for the discussion and exposure of viewpoints with respect to the need for more industry.

b. With respect to the need for more and better paying jobs for men and women, Tri County proposes to carry public service announcements which would encourage local business people to seek out, hire and train black and white persons who have little or no training and to broadcast information to the public concerning vocational centers which offer training courses and institutions of higher learning which sponsor adult basic education classes. So-called public affairs programs, *supra*, "Viewpoint", "Know Your Government", and also one entitled "The People Speak", are to be used to encourage the expression of thoughts and ideas regarding solutions to the problem of providing more and better paying jobs.

c. With respect to the need for more and better roads, the applicant proposes to carry appropriate public service announcements and to encourage community leaders, individuals and organizations to express their opinions on the subject on proposed public affairs programs, *e.g.*, "Know Your Government", "Viewpoint" and "The People Speak".

d. With respect to the need for more doctors, dentists and medical facilities, the applicant proposes to carry appropriate public service announcements, to carry appropriate local news items in cooperation with the health department and to encourage discussions on the subject on "Know Your Government" and "Viewpoint".

e. With respect to the need for better understanding between the races, the applicant states that it believes that carrying the proposed broadcast matter mentioned above in subpara. (a) would help achieve the desired end result. In addition, the applicant states that it will carry broadcast matter on programs *e.g.*,

"Know Your Government", "Viewpoint"' and "Partyline", which will be designed to help both races have a better understanding of the problems, activities and needs of the communities.

f. With respect to the additional needs listed above, the applicant plans to deal with the matters listed by means of public service announcements and by means of exposure of viewpoints of community leaders, organizations and the general public on the public affairs programs proposed to be carried.

26. Tri County's proposed findings, para. 38–41, inclusive, are devoted to a detailed description of specific programs proposed, together with the times and days of the week on which they are scheduled and the proposed formats, which the applicant expects will deal with the problems, needs and interests of its service areas.

C. *The Antenna Efficiency Issue Against Tri County* (*Issue 6, supra*)

27. Subsequent to designation for hearing, the Review Board added Issue 6, *supra*, which questions the ability of the antenna system proposed by Tri County to attain the minimum required efficiency of 175 mv/m/kw. By Order released March 29, 1971, however, the Hearing Examiner granted a petition to amend to change the proposed ground system of Tri County. The ground system now proposed consists of 120 radials 346 ft., or one quarter wavelength long, which, when used with the proposed 250 ft. antenna, will produce an effective field of 180 mv/m as determined from Figure 8 of the Commission's Rules. The antenna efficiency, therefore, obviously meets the minimum requirement set forth in Section 73.189(b)(2)(ii) of the Rules. The Examiner ordered the acceptance of the amendment subject to the following condition being attached to any construction permit issued: [8]

Permittee shall submit proof that the radiation of the proposed operation has been reduced to substantially 175 mv/m per kilowatt.

D. *The Financial Issue Against Radio Tupelo*

28. The Commission has designated a broadly phrased financial issue against Radio Tupelo. However, from its Memorandum Opinion and Order (FCC 70–1038, released October 2, 1970), paragraph 4, it is abundantly clear that the Commission's concern was in fact limited to its calculation that "an additional $35,690 will be needed [by Radio Tupelo] over and above what has been shown [in its application]" and by the failure of the financial statements of Radio Tupelo's two partners "to reveal sufficient liquid assets to meet their individual loan commitments [to the applicant]".[9] Apparently the Commission was able to accept the applicant's estimate of $117,690.00 as the sum required to construct and to operate the station it was proposing for one year without reliance on revenues. The record now shows, however, that Radio Tupelo has itself revised the latter figure to $121,595.16, in order

[8] The Examiner's Order is to be read in conjunction with the "Comments" filed by the Broadcast Bureau on March 22, 1971, in response to Tri County's petition for leave to amend its application. See Order released March 29, 1971, FCC 71M–466. And see para. 3, *supra*.

[9] In accordance with the position taken by the counsel for the Broadcast Bureau during the course of the hearing, to the effect that the phrasing of the broad financial issue in the Order designating the applications for hearing was simply an inadvertent mistake (T. 111, 112), the Examiner ruled that the applicant had no burden in this case to develop a record that exceeded the scope of the questions which concerned the Commission as explained in the text of the Designation Memorandum Opinion and Order (T. 113–116). However, out of an abundance of caution, the Examiner, over objection, did allow some latitude to opposing counsel on cross-examination and authorized the taking of an interlocutory appeal from his ruling (T. 117–133). No such appeal was ever taken herein.

to account for the increased expenses incurred as a consequence of its revised plan of raising the capital it will require.[10]

29. Cast in terms of the issue as qualified and limited by the matters which evidently concerned the Commission when it processed Radio Tupelo's application,[11] the findings proposed by the Commission's Broadcast Bureau on this matter reflect a sufficiently complete and accurate analysis of the record to merit their adoption, as follows:

30. Radio Tupelo proposes to meet its first-year expenses and construction costs as follows:

Loan from Bank of Mantee	$45,000
Loan from Ralph Mathis	43,000
Loan from Aubrey Freeman	20,000
Loan from Mathis and Freeman	25,000
	133,000

The $45,000 proposed loan, *supra*, from the Bank of Mantee is set forth in a letter dated February 1, 1971 and addressed to Radio Tupelo, c/o Mr. Ralph Mathis. It declares that the loan has been approved, based on financial statements of the partners. The letter further states that the loan will be for a period of five years with no principal payment required for the first year; the principal payments thereafter to be made monthly. The interest rate is not determinate. The bank avers, however, that it will be based on the prevailing rate in force at the time the loan is made, "which in all probability will not be more than 1% above the prime rate". Radio Tupelo has assumed an interest rate of 8% for the purposes of its financial showing herein. The loan commitment letter is signed by the President of the Bank of Mantee. It also appears from the evidence that the bank will require no collateral from Messrs. Mathis and Freeman.

31. By a letter addressed to the partnership (Radio Tupelo), Mr. Ralph Mathis has indicated that he will lend it the $43,000.00, *supra*, "which is to be obtained by me from Felix H. Brown and Lyndon S. Mathis". He represented that the loan to the partnership is to be made at an interest rate of 6% per annum, payable, interest only, for the first year; "thereafter repayment will be made upon terms and conditions satisfactory to me at the time the said year elapses".

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[10] According to Radio Tupelo's Ex. 3, if interest on loans from the partners is waived completely, the total capital requirement would stand at $117,815.16. It also appears therefrom that the applicant is now proposing a bank loan of $45,000.00 with interest estimated at 8%, whereas at the time its application was set for hearing it was proposing a $50,000.00 loan at an estimated interest rate of 9%. At 8%, the first year's interest on $45,000.00 amounts to $3,600.00, which Radio Tupelo has incorporated in its $121,595.16 total estimate.

[11] Consistent with his ruling during the course of the hearing, which, by interpretation, narrowed the scope of the financial issue to the questions that evidently concerned the Commission when it processed Radio Tupelo's application, the Examiner excluded Tri County Ex. 3, among other things, and he hereby specifically refuses to adopt those Tri County proposed findings that would substitute Tri County's Judgment for that of Radio Tupelo's on the matter of estimated construction costs and first year's operating expenses. Considering the nature of the facility applied for (an AM radio station and not a TV station) the total capital investment involved (which is not tremendous, no matter how one may look upon the situation), it appeared to the Examiner that neither the ends of justice nor the needs of the public's interest could possibly be served by making a "federal case" out of this problem (T. 132).

32. In order to obtain the $43,000.00 which he is to lend to the applicant, Mr. Mathis has arranged to receive two loans from individuals. One is a loan of $25,000 from Mr. and Mrs. Lyndon A. Mathis, the terms of which are set forth in a letter dated October 22, 1970. This letter declares that the loan "shall be repaid, interest only for the first year and, thereafter, it shall be paid at a rate of $238.93 per month, including principal and interest, for a period of fifteen years. The interest rate shall be 6% per annum". Along with their letter, Mr. and Mrs. Lyndon A. Mathis included a balance sheet showing that they have available, in cash on hand and in banks, the sum of $27,512.95, and that they have no liabilities. Also, Mr. and Mrs. Lyndon Mathis have included supporting letters from a savings institution and a bank which indicate the amounts of money that they have on deposit in each, a total of $26,068.30. It appears that no collateral is to be required by Mr. and Mrs. Lyndon Mathis for their proposed loan. Mr. Lyndon Mathis is Mr. Ralph Mathis' brother.

33. The other loan Mr. Ralph Mathis relies upon in order to obtain the $43,000.00 he is committed to lend the partnership was described in a letter addressed to him by Mr. Felix H. Brown. Mr. Brown declared therein that he will lend Mathis $18,000.00 "to be used to meet the construction costs and first year of operation of your proposed AM radio station in Tupelo, Mississippi". The terms of the loan from Brown to Mathis will "require payment of interest only for the first year and thereafter a payment of $199.84 a month, to include principal and interest, for a period of ten years. The interest rate shall be 6% per annum". As did Mr. and Mrs. Lyndon Mathis, Mr. Brown included with his letter a financial statement showing that he had, *inter alia*, a total of $18,000 on deposit in a bank and savings institution and no liabilities. Letters from the bank and savings institution confirm Mr. Brown's deposits of $18,000.00. Like the Lyndon Mathis', Mr. Brown is willing to advance the money without collateral. He is Mr. Ralph Mathis' brother-in-law.

34. Mr. Aubrey Freeman, the other Radio Tupelo partner, is committed to lend the partnership $20,000.00. Mr. Freeman is to obtain the $20,000.00 through a loan from the Bank of Houston. A letter to Mr. Freeman, dated November 5, 1970 commits that institution to lend Mr. Freeman $20,000.00 "to meet the construction cost and first year operation for your proposed AM station at Tupelo, Mississippi * * *". The letter specifies the following conditions:

1. Interest rate shall be at the prime rate charged by the major New York banks at the time the loan is effected.
2. Interest payments only each month for 12 months from date of inception.
3. Principal and interest payments monthly from that date forward in a sufficient amount to amortize the loan in full within a total period of 120 months from inception.

In addition, the Bank of Houston will require a second mortgage on Mr. Freeman's house and lots at 363 West Church Street, Houston, Mississippi as collateral. Mr. Freeman committed himself of record herein to provide the collateral required by the bank.

35. The Bank of Mantee, *supra*, was familiar with the fact that Mr. Mathis plans to buy radio equipment from Collins Radio Company with long-term financing, and with the fact that Mathis proposes to borrow substantial sums from Lyndon Mathis and Felix Brown before it made its offer to lend the partnership $45,000.00. Likewise, on February 11, 1971, the Bank of Houston confirmed that its offer to lend Mr. Freeman $20,000 to invest in the Tupelo Radio application was made with the knowledge of the additional financing plans of the applicant.

36. In addition to the foregoing, Messrs. Mathis and Freeman jointly have promised, in writing, to loan an additional $25,000.00 to the partnership. Messrs. Mathis and Freeman have, together, already paid in the sum of $6,500.00, leaving a balance of $18,500.00 to be paid. Mr. Mathis' balance sheet shows that he has $4,500.00 on hand and in banks, and that he owns stock in WCPC Broadcasting Company, Inc., Houston, Mississippi, valued at $122,025.41. Mr. Mathis is required by the Order designating the applications for hearing to divest himself of all interest in WCPC, Houston, Mississippi, before Radio Tupelo will be authorized to conduct program tests. Mr. Mathis has testified that, should Radio Tupelo receive a construction permit in this proceeding, he would comply with the condition in the designation Order requiring him to divest himself of any interest in, and severing any connection with the licensee of WCPC, Houston, Mississippi (T. 98–99). For his part, Mr. Freeman currently has $7,500.00 in cash on hand and in banks; $500.00 in a savings account; and life insurance with a cash surrender value of over $3,000.00. The total of Messrs. Mathis' and Freeman's available liquid assets, therefore, amounts to $15,500.00, leaving them $3,000.00 short, apparently, of the required $18,500.00. However, as has been noted above (para. 28), Radio Tupelo's aggregate financial requirements amount, according to the latest estimate, to $121,595.16 and thus the applicant may not have to raise the $133,000.00 figure cited in paragraph 30, *supra*. Of course, the amount of cash Mr. Mathis might realize on the sale of Station WCPC, Houston, Mississippi is not being taken into account in this calculation, even though Mr. Mathis has valued his interest therein at $122,025.41.

CONCLUSIONS

37. As the foregoing findings of fact foretell, it is to be concluded that both applicants herein are qualified to be licensees. Tri County has clearly satisfied the Commission's "Primer" requirements on the ascertainment of community needs and problems (Issue 3, *supra*), and the amendment to its application of March, 1971, under which Tri County's proposed ground system has been improved, warrants a conclusion that the Tri County proposed antenna system is capable of attaining the minimum efficiency requirement (175 mv/m/kw) of Rule 73.189(b)(2)(ii), so that the issue on this matter, which the Review Board has added, no longer presents any problem (Issue 6, *supra*). It is also quite clear that Radio Tupelo can produce a total sum in the

neighborhood of $130,000.00, which more than suffices to meet the estimated construction costs and first-year operating expenses of $121.596.16; that the partners therein will be generally able to meet their financial commitments to the partnership; and that the loan of $45,000.00 to Radio Tupelo from the Bank of Mantee will also be available when needed. Accordingly, Radio Tupelo is considered to be financially qualified in terms of the issue as the Examiner has construed it (Issue 2, *supra*).

38. Having thus concluded that both applicants are qualified minimally or basically, the decision herein must turn on the facts pertaining to the "307(b) Issues" (Issues 1 and 4, *supra*). Section 307(b) of the Federal Communications Act, as amended, in pertinent part requires that the Commission, "In considering applications for licenses . . . make such distribution of licenses, frequencies, hours of operation, and of power among the . . . communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same". Apart from considering the factor of 'efficiency', which is concerned primarily with a comparison of numbers of persons to be served under the respective proposals, it is incumbent upon the Commission, in conformity with the statute, to give especial weight to public "need" in the process of determining which proposal is the more consonant, under the facts of the case, with the ideal of effectuating a fair and equitable distribution of radio facilities. In the principal case there can be no doubt, of course, that Radio Tupelo, with greater proposed power, will serve a larger number of people than will Tri County. Nor is there any question that Tupelo, in terms of population density or size alone (20,471) is a more 'needful' community than Eupora with its population of only 1,792, and that if neither community, therefore, had had an aural broadcast facility of its own there would be no doubt that Radio Tupelo would have to be preferred. The point, however, is that Eupora, set in predominantly rural Webster County, is completely lacking in *any* broadcast voice for local self-expression, whereas Tupelo, an urban center, now has two unlimited time AM, one FM, and one TV stations to serve as outlets for local self-expression, with presumably a third, daytime only, AM station on the way in addition (*i.e.*, with an outstanding construction permit for the same). Moreover, the evidence shows that in all of rural Webster County, Mississippi, in which Eupora is located, there are no broadcast outlets at the present time; that Eupora itself is not located in an urbanized area as that term is defined by the U.S. Census; and that under the Tri County proposal 81,185 persons—in other words in itself a very substantial population—would receive standard broadcast service in an area of 3,888 square miles, *all of which is rural in character.*

39. While in other settings than that above-described, as urged by Radio Tupelo in its proposed conclusions, the Commission might well be persuaded to favor *an additional* standard broadcast allocation to a populous community over the allocation of a first such facility to a community with a population of under 2,500, *e.g.* Eupora, the Examiner is convinced primarily by the rural context here, that providing the first local broadcast outlet to Eupora and Webster County must be deemed to be decisive in the determination of where lies the greater

"need".[12] Moreover, although its population is relatively small, the evidence does indicate that Eupora *is* a place of some importance, since it is Webster County's (pop. 10,047) largest community, in which many County and State offices happen to be located. In the light of the deducible substantially greater "need", consequently, for a first local broadcast outlet for self-expression in Eupora and Webster County than for a 3rd, or 4th, standard broadcast station in Tupelo (with operating FM and TV stations already allocated to it), and in the light of the fact, as well, that the evidence demonstrates that multiple "reception" services are available to practically all areas either applicant will serve (*i.e.*, there are no significant underserved areas that one applicant would serve that the other will not from a "reception" service point-of-view),[13] Radio Tupelo merits only a slight or moderate, but not decisive, preference over Tri County by virtue of its proposed service to 366,393 persons in 10,610 square miles in comparison with Tri County's proposal to serve 81,185 persons in 3,888 square miles. It may also be observed that, although Tupelo is the more populous community, there is nothing either in the evidence or in the real world of experience to suggest that it has any "need" at all for a 3rd or 4th standard broadcast station sufficient to justify depriving another town—Eupora—of an opportunity for its very first such facility. *Cf. Mercer Broadcasting Co.*, 22 FCC 1009, 1026, 13 RR 891, 911 (1957); and see *Monroeville Broadcasting Co., et al.*, 35 FCC 657 (1963). Of equal importance, surely not to be overlooked, is the fundamental Commission allocation policy, re-articulated in 1965, of bringing ". . . a first local aural service to as many independent communities as possible" (*Policy Statement on Applications for Suburban Communities*, 2 FCC 2d 190, 191), which a grant of the Tri County application will clearly further. (See Tri County's proposed conclusions, para. 18, and precedents therein cited in support of the long-standing Commission policy which recognizes, and seeks to implement, the importance of providing a first local outlet of expression to a community wherever feasible.)

40. So that the record may be complete in the event of an appeal, the Examiner takes note of the tabulation in paragraph 4 of the Broadcast Bureau's conclusions, which is a particularly helpful (and accurate), side-by-side comparison of the two proposals herein in terms of populations served and the numbers of AM and aural services providing such service, and the more terse summary of the same in paragraph 5 thereof. Paragraph 4 is adopted and deemed to be incorporated herein by reference. Paragraph 5 is also adopted to the extent that it is hereby quoted, as follows:

"The tabulation . . . shows that Tri County will not provide a first aural or AM service to anyone. The same is true for Radio Tupelo. Tri County will provide a

[12] The Examiner considers the fact situations in the cases cited in Radio Tupelo's "Conclusions", para. 15, 19, and 22, to be inapposite. The *Riverside Church* case, in particular (29 FCC 241), in which the Hearing Examiner herein happened to have been counsel for the Broadcast Bureau (1959), involved the allocation of a "class B" FM broadcast facility to New York City and turned on the proper construction to be given to a provision of the Commission's then-effective FM rules, under which "class B stations" were designed explicitly "to provide wide population and area coverage", in contrast to "class A" FM stations. The New York City and Long Island areas are in no sense comparable to rural Mississippi.

[13] The reasoning in the text concerning "reception" services is intended to be qualified by paragraph 40 hereof, *infra*, which, among other things, points out that Tri County will provide a third aural service to 405 more persons than Radio Tupelo, etc.

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second aural service to 47 persons. Again, the same is true for Radio Tupelo. However, Tri County will provide a third aural service to 2,083 persons, which is 405 more than Radio Tupelo's 1,678. In all other respects Radio Tupelo will provide a new service to many more persons than will Tri County. Accordingly, in the most critical areas of comparison, *i.e.*, first, second and third aural services, [the] applicants are almost even, with Tri County having a slight edge. In the far less critical areas of comparison (new AM service and fourth, fifth and sixth aural services), Radio Tupelo is vastly superior. That superiority in these less critical areas, however, cannot be said to be decisive. What is decisive is the fact that Tri County will provide the first broadcast outlet to Eupora and Webster County. That fact is of significant decisional importance. * * *"

41. Accordingly, while it may be concluded that both applicants possess the necessary minimal qualifications to be licensees of the Commission, it is concluded at the same time, predicated on all the evidence of record and the foregoing findings of fact, that Tri County's proposal will serve the public interest, convenience and necessity better than Radio Tupelo's will, and therefore, that the Tri County application must be granted herein.

IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the Initial Decision on its own motion pursuant to Rule 1.276, the application of Ralph Mathis and Aubrey Freeman, d/b as Radio Tupelo for a construction permit for a standard broadcast station to operate in Tupelo, Mississippi on the frequency 710 kHz (Class II), with 5 kw power, daytime only, employing a directional antenna, is hereby DENIED; and

IT IS ORDERED FURTHER, That the application of Olvie E. Sisk, Ivous T. Sisk and Joel E. Camp, d/b as Tri County Broadcasting Company, for a construction permit for a standard broadcast station to operate in Eupora, Mississippi, on the frequency 710 kHz (Class II), with 0.5 kw power, daytime only, is hereby GRANTED subject, however, to the following condition:

"Permittee shall submit proof that the radiation of the proposed operation has been reduced to substantially 175 mv/m per kilowatt."

FEDERAL COMMUNICATIONS COMMISSION,
DAVID I. KRAUSHAAR, *Hearing Examiner.*

F.C.C. 73R–122

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of UNITED BROADCASTING CO. OF FLORIDA, INC. For Renewal of License for Radio Station WFAB, Miami, Fla.	Docket No. 19664 File No. BR–4447

MEMORANDUM OPINION AND ORDER

(Adopted March 16, 1973; Released March 22, 1973)

BY THE REVIEW BOARD:

1. The above captioned application was designated for hearing by Commission Order FCC 72–1195, released January 2, 1973. That order included issues which sought to determine whether United Broadcasting Company of Florida, Inc. was qualified to continue as licensee of this Commission because of certain operating practices during the past licensed period. United has now filed a petition to enlarge the issues to permit it to show the meritorious aspects of the station's past operation. There have been no oppositions filed. The petition to enlarge issues will be granted. It is well settled that where a hearing involves issues concerning the past operation of the broadcasting station, the licensee will be permitted to show the meritorious aspects of its operation prior to the time it was put on notice that its qualifications were in question. *Lum A. Humphries, tr/as Wagoner Radio*, 12 FCC 2d 978, 13 RR 2d 1146 (1968); *Chronicle Broadcasting Company*, 18 FCC 2d 120, 16 RR 2d 494 (1969), and the cases cited therein.

2. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed by United Broadcasting Company of Florida, Inc., on January 23, 1973, IS GRANTED; and

3. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED as follows:

To determine whether the past programming of Station WFAB has been meritorious, particularly in regard to public service programs.

4. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof under the issue added herein SHALL BE on the applicant.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 73-305

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF THE UNIVERSITY OF FLORIDA, LICENSEE OF RADIO STATION WRUF, GAINESVILLE, FLA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1973; Released March 19, 1973)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability dated August 4, 1971, addressed to the University of Florida, licensee of Radio Station WRUF, Gainesville, Florida, and (2) licensee's response to the Notice of Apparent Liability dated September 13, 1971.

2. The Notice of Apparent Liability in this proceeding was issued because of the licensee's apparent violations of Section 1304, Title 18, U.S. Code in that the licensee broadcast information relating to a lottery on March 23, 24, 25, 26 and 27, 1971.[1] The Notice indicated that the licensee was subject to apparent forfeiture liability in the amount of two thousand dollars ($2,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended.

3. In response to the Notice of Apparent Liability, the licensee requests that it be relieved of liability or that the forfeiture be reduced. Licensee states that the order for the announcements in question was placed with its sales manager who, upon making inquiry of the advertising agency, was informed that "the copy was cleared by an attorney" and that the promotion did not constitute a lottery. Further, licensee states that at the time that the spots were ordered two key personnel were absent and that a student assistant, one of 35 in training, transcribed the copy. Also, licensee contends that the promotion is not

[1] The announcements were made at the following times:

Tuesday, March 23	Wednesday, March 24	Thursday, March 25	Friday, March 26	Saturday, March 27
9:45 a.m.	6:48 a.m.	8:40 a.m.	8:45 a.m.	7:42 a.m.
10:23 a.m.	9:53 a.m.	9:51 a.m.	9:50 a.m.	8:23 a.m.
12:51 p.m.	10:20 a.m.	11:05 a.m.	10:29 a.m.	11:29 a.m.
2:43 p.m.	11:21 a.m.	2:29 p.m.	2:13 p.m.	1:44 p.m.
4:33 p.m.	2:26 p.m.	3:06 p.m.	3:42 p.m.	5:22 p.m.
6:45 p.m.	4:28 p.m.	4:19 p.m.	4:31 p.m.	6:33 p.m.

clearly a lottery since all persons who purchased an automobile received some prize and that while it does not "challenge the Commission's determination that all three elements of lottery were present," it requests that some consideration be given to fact that the illegality is not readily apparent since other radio stations and a newspaper accepted the copy. Licensee asserts that it took reasonable steps to assure itself that the promotion was not illegal and states:

> In the past, the Commission has recognized that forfeitures should not be imposed upon stations which after the exercise of due diligence, make good faith mistakes. See *Taft Broadcasting Co.*, 16 RR 2d 507 (1969); compare *Call of Houston, Inc.*, 13 RR 2d 460 (1969). This principle should apply here.

Also in mitigation, licensee cites its past record, asserts that it has always done its best to comply with the Act and all Commission regulations, and argues that fines of this magnitude should be reserved for cases of flagrant, knowing abuse.

4. It appears from the circumstances in this case that the following announcement was broadcast 30 times over a period of five days:

> Shaw and Keeter has an extra bonus for you . . . A U.S. Savings Bond with *every* new car or truck delivered! *At least* a $25 bond . . . it *might* be a $50 bond . . . it *could* be a $500 bond! After purchase, check the sealed envelope in the glove box with the sealed envelope in the office. It *will* be a $25 bond . . . it might be a $50 bond . . . it could be a $500 bond! Offer *ends* March 31st! *Hurry* to Shaw and Keeter Fordtown, downtown at 238 West University Avenue!

Licensee states that it does not challenge the determination that all three elements of lottery are present in this promotion and it is apparent that a prize was offered in the form of a bond, consideration was necessary in that participants were required to make a purchase and, since participants received bonds in varying amounts, chance was present. Thus, the promotion contained all of the elements of a lottery.

5. As for mitigation, licensee requests that its past good record be considered and cites the *Taft* case for the principle that the Commission does not impose forfeitures for good faith mistakes made after the exercise of due diligence. In the *Taft* case, coupons were inserted in loaves of bread which were of no value or varying redeemable cash values and free coupons were distributed at no cost, but free coupons were available only one to a customer. The Commission found this to be a lottery because free coupons were not reasonable equally available, since customers, in addition to obtaining a free coupon, could obtain many more coupons by purchasing bread. Although the Commission noted in the *Taft* case that the licensee did exercise diligence in that it specifically raised questions about and was assured that free coupons would be freely available at retail outlets and that the licensee discontinued advertising the promotion prior to Commission inquiry upon learning that free coupons were not available in accordance with representations made by an advertising agency, the Commission reminded the licensee of its duty to exercise special diligence to assure that a contest offered for advertisement was not a lottery *ab initio*, and, furthermore, stated that it was under an affirmative obligation to take steps to assure that the contest did not become a lottery due to the manner in which it was actually conducted. The licensee in that case, however, was not relieved of liability because of a good faith mistake but because there were no prior judicial or Commission deci-

sions which would have enabled the licensee to reasonably anticipate that the contest in question was a lottery. Thus, the facts in the *Taft* case are quite different from the facts in this case in which the licensee knew or should have known that it was broadcasting information concerning a lottery. Moreover, the fact that other stations may have accepted the advertising does not excuse the licensee from compliance.

6. Licensees are responsible for assuring that they operate in accordance with Section 1304, Title 18 of the U.S. Code as well as the Communications Act and the Commission's Rules and policies, and as we have held in the past, licensees are responsible for the acts of their employees. *International Broadcasting Corp.*, 19 FCC 2d 796 (1969). A licensee will not be relieved of liability merely because it relied on information supplied by an advertising agency, which was an interested party. Considering all of the circumstances of this case, we are not persuaded to mitigate or remit the forfeiture.

7. In view of the foregoing, IT IS ORDERED, That the University of Florida, licensee of Radio Station WRUF, Gainesville, Florida, FORFEIT to the United States the sum of two thousand dollars ($2,000) for failure to observe Section 1304 of Title 18 of the U.S. Code. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the Order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days of the date of receipt of this Memorandum Opinion and Order.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission send a copy of this Memorandum Opinion and Order by Certified Mail—Return Receipt Requested to the University of Florida, licensee of Radio Station WRUF, Gainesville, Florida.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-291

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
VALLEY CABLE VISION, INC, DERBY, ANSONIA, AND SEYMOUR, CONN.	Files Nos. CAC-115, CAC-116, CAC-119
TELESYSTEMS CORP., MERIDEN, PROSPECT, CHESHIRE, WOLCOTT, AND SOUTHINGTON, CONN.	Files Nos. CAC-154, CAC-155, CAC-156, CAC-157, CAC-158
WATERBURY COMMUNITY ANTENNA, INC., WATERBURY, MIDDLEBURY, AND PLYMOUTH, CONN.	Files Nos. CAC-179, CAC-180, CAC-181
GROSSCO CATV, INC., BRISTOL, FARMINGTON, PLAINVILLE, NEW BRITAIN, AND BERLIN, CONN.	Files Nos. CAC-369, CAC-370 CAC-371, CAC-372, CAC-373
EASTERN CONNECTICUT CABLE TELEVISION, INC., NEW LONDON, EAST LYME, MONTVILLE, AND WATERFORD, CONN.	Files Nos. CAC-534, CAC-535, CAC-536, CAC-537
LAUREL CABLEVISION, INC., TORRINGTON, LITCHFIELD, WATERTOWN, AND THOMASTON, CONN.	Files Nos. CAC-906, CAC-907, CAC-908, CAC-909
NEW ENGLAND INDUSTRIES, INC., HARTFORD, BLOOMFIELD, EAST HARTFORD, WEST HARTFORD, SIMSBURY, AND WINDSOR, CONN.	Files Nos. CAC-929, CAC-930, CAC-931, CAC-932, CAC-933, CAC-934
GREATER HARTFORD CATV, INC., MANCHESTER, GLASTONBURY, NEWINGTON, ROCKY HILL, AND WETHERSFIELD, CONN.	Files Nos. CAC-944, CAC-945, CAC-946, CAC-947, CAC-948
NORTHWEST CABLEVISION, INC., WINCHESTER, CONN.	File No. CAC-1055
NEW MILFORD CABLE VISION CO., NEW MILFORD AND BRIDGEWATER, CONN.	Files Nos. CAC-1068, CAC-1069
CABLE VIDEO, INC., NORWICH, LISBON, FRANKLIN, SPRAGUE, AND BOZRAH, CONN.	Files Nos. CAC-1133, CAC-1134, CAC-1135, CAC-1136, CAC-1137
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1973; Released March 20, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON, H. REX LEE AND WILEY CONCURRING IN THE RESULT.

1. On November 30, 1972, Connecticut Television, Inc., licensee of Station WHNB–TV, New Britain, Connecticut, filed a Motion to Consolidate asking that we consider the above-captioned applications on a consolidated basis. On December 20, 1972, the Commission granted the motion to the extent it related to the Connecticut cable television franchises, which were granted by the Connecticut PUC and are identical, and otherwise denied the motion. *Valley Cable Vision, Inc.*, FCC 72–1169, 38 FCC 2d 959. On February 2, 1973, Connecticut Television, Inc., filed a Petition for Reconsideration. Oppositions thereto have been filed by several of the applicants.

2. Connecticut Television, Inc. asserts five reasons why we should reconsider our December 20 action: (1) consolidation is appropriate because common deficiencies exist in all the franchises; (2) Commission action was premature in view of the fact that a proceeding is pending before the Connecticut PUC which could change the franchises; (3) Commission action was premature because the decision rested on the rationale of *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10, and a petition for reconsideration is pending in that case; (4) the Commission, in the context of a single adjudicatory proceeding [*CATV of Rockford, Inc., id.*], interpreted a Commission rule so liberally that the effect was to rescind the rule without a rulemaking proceeding; and (5) under any interpretation of the "substantial compliance" doctrine the Connecticut franchises are so deficient in two particular respects that we should not have determined that they comply with the standards of Section 76.31 of the Rules.

3. Connecticut Television, Inc., argues that consolidation of the above-captioned cases is appropriate "because fundamental deficiencies of controlling decisional significance exist in all of the Connecticut CATV franchises." Apparently, Connecticut Television fails to realize that we did grant its motion to consolidate insofar as it related to the franchise deficiencies and denied the motion only insofar as it asked us to consider all other aspects of each application in a single proceeding.[1] We determined that such a unified proceeding was inappropriate because of the substantial differences in the various applications. Connecticut Television has not asked us to reconsider that procedural determination and we will not. What Connecticut Television actually objects to is our substantive determination (made simultaneously with our grant of the motion to consolidate the franchise issue) that the franchises comply with our standards.

4. Connecticut Television's argument that our action was premature because of a pending proceeding before the PUC to modify the fran-

[1] Likewise, the argument made in opposition to the present petition for reconsideration by Greater Hartford CATV, Inc., Grossco CATV, Inc., and Telesystems Corporation that the petition should be dismissed because it asks the Commission to reconsider an interlocutory decision is not well taken. To the extent that we held the Connecticut franchises substantially consistent with our rules, our December 20 action was not interlocutory.

chises is merely repetitive of the argument made in the original motion to consolidate which we rejected then. Cable television franchises are by their very nature subject to changes and modifications; this is particularly true in the case of PUC type regulation where rulemaking actions taken by the PUC pursuant to local law might affect all franchises in the state. However, there is no reason for us to delay the certification process merely because a rulemaking is pending before the PUC which might change the franchises. In our December 20 action we stated that we were aware of the pending rulemaking but that the Connecticut PUC had advised us that the rulemaking did not warrant further delay in our processing of certification applications. Connecticut Television has not persuaded us to modify that statement.

5. Connecticut Television further argues that, since petitions for reconsideration of *CATV of Rockford, Inc., supra*, are pending before the Commission, "the prudent course in terms of sound administrative policy would have been for the Commission to postpone" a decision in the present case pending final resolution of *CATV of Rockford*. We were aware that petitions for reconsideration had been filed in *CATV of Rockford* when we made our original determination herein; moreover, the policy originally enunciated in *CATV of Rockford* has been consistently applied by the Commission on several other occasions, *e.g., Television Incorporated*, FCC 72–1190, 38 FCC 2d 954; *Johnson All Channels, Inc.*, FCC 72–1008, 38 FCC 2d 61; *Tulsa Cable Television*, FCC 72–1011, 38 FCC 2d 83, in cases for which no petitions for reconsideration have been filed.

6. The doctrine of "substantial compliance" or "substantial consistency" with our franchise standards was first announced in Paragraph 115, *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 366 (1972), and incorporated into the rules in "Notes" to Section 76.13(a)(4) and –(b)(3), as a method of dealing with cable operators who had received their franchises before March 31, 1972, but who had not begun operations by that date. In *CATV of Rockford, Inc., supra*, and numerous other cases, some of which are cited in the previous paragraph, we announced that the term "substantial compliance" would be interpreted liberally. Connecticut Television claims that the effect of such liberal interpretations in adjudications amounts to an amendment or abandonment of the rules without a rulemaking proceeding, thus denying due process to persons who were not parties to the adjudications. In support of this theory, Connecticut Television asserts that the Commission has made determinations in numerous cases that franchises substantially comply with the Commission rules without sufficient analysis and without first evaluating the possible adverse public interest consequences; that apparently no pre-March 31, 1972, franchise has been found not substantially consistent with Commission rules; and that the Commission's definition of "substantial compliance" is not the generally accepted definition of the term. However, an administrative agency has authority to interpret its regulations in the context of adjudicatory proceedings. *See SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1946). Each franchise is reviewed in the certification process and, in the case of pre-March 31, 1972 franchises, a determination is made whether the franchise substantially complies

with Commission standards and whether a grant of a certificate would be consistent with the public interest. In fact, the Commission has in one case refused to hold that a franchise was substantially consistent with the Commission's franchise standards. *Verto Corporation*, FCC 72–1007, 38 FCC 2d 963.[2] The argument that we have held no other pre-March 31, 1972, franchises to be inconsistent with our standards is not relevant: in our work load order we have first decided cases which presented the fewest problems and are now beginning to reach the more difficult cases. Furthermore, we note that although Connecticut here objects to the policy we announced in *CATV of Rockford, Inc.*, it did not attempt to intervene in the reconsideration of that case. We have made the determination, based on our interpretation of the regulation, that the Connecticut franchises substantially comply with the Commission's franchise standards; Connecticut Television has not persuaded us to alter that determination.

7. Connecticut Television's final argument is that, under any interpretation of "substantial compliance," the Connecticut franchises are fatally deficient in two particular respects: (1) the eight percent gross receipts tax on cable television in Connecticut is inconsistent with Section 76.31(b) of the rules and (2) the fact that there was no public participation in the franchise process is inconsistent with Section 76.13 (a)(1) of the rules. Again, we note that Connecticut Television made these claims in its original motion to consolidate and offers no new evidence in its petition for reconsideration. In our original decision herein we did not reach the question of whether a gross revenue tax imposed by a state on all public service organizations is a "franchise fee" within the meaning of our Rules, but held merely that the eight percent gross receipts tax in Connecticut substantially complies with Section 76.31(b) of the Rules. Connecticut Television has presented no evidence to persuade us to reconsider our earlier holding. Section 76.31 (a)(1) requires that the franchise recite that an award was made only after public proceeding. A Connecticut statute contains the same requirement: the franchise recites that such law was followed. A trial court in Connecticut found in three separate case (in one of which Connecticut Television was the plaintiff) that the statutory standard was followed and the trial court's opinions were affirmed by the Connecticut Supreme Court. *Connecticut Television, Inc.* v. *PUC*, 159 Conn. 317, 269 A. 2d 276 (1970). Furthermore, as we stated in our original opinion herein, "public notice appeared in newspapers throughout the State and coverage was provided by other media. The PUC then held ninety-three public hearings over a period of three years...." Connecticut Television's reiteration of its argument that no member of the public did in fact participate does not convince us to alter our determination that there was the "full public proceeding affording due process" required by Section 76.31.

[2] However, the Commission there found that the applicant had made a significant financial investment which justified the grant of a certificate until March 31, 1977. *See* Section 76.31(a)(6) of the Rules.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed February 2, 1973, by Connecticut Television, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Oppositions to Petition for Reconsideration" filed February 6, 1973, by New England Industries, Inc., February 12, 1973, by Greater Hartford CATV, Inc., and Waterbury Community Antenna, Inc., February 16, 1973, by Eastern Connecticut Cable Television, Inc., and Cable Video, Inc., and February 15, 1973, by Grossco CATV, Inc., ARE GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–119

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of ROBERT COWAN WAGNER, PINEVILLE, LA.	Docket No. 19473 File No. BP–18465
SOUTHEAST ARKANSAS RADIO, INC., DERMOTT, ARK.	Docket No. 19474 File No. BP–18476
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adoped March 16, 1973; Released March 22, 1973)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSTAINING.

1. The above-captioned mutually exclusive applications, together with the application of Patrick H. Robinson for a new station at Monroe, Louisiana, were designated for hearing by Commission Memorandum Opinion and Order, FCC 72–235, released March 24, 1972, 37 FR 6516, published March 30, 1972. Robinson's application was subsequently dismissed by order of the Presiding Judge, FCC 72M–682, released May 24, 1972. The remaining applicants determined that if Southeast Arkansas Radio, Inc. (Southeast) modified its directional antenna pattern, it would be possible to grant both applications. Accordingly, on September 11, 1972, Southeast filed a petition for leave to amend, to sever and for reimbursement. Southeast asserted that if its petition was granted, it would remove the mutual exclusivity between its application for Dermott, Arkansas and Robert Cowan Wagner's (Wagner) application for Pineville, Louisiana, thus bringing a first local broadcast outlet to each of those communities. The Broadcast Bureau opposed Southeast's petition, contending that the amendment was not timely filed and that good cause, as required by Section 1.522(b) of the Commission's Rules, had not been shown. Nevertheless, the Presiding Judge ruled at a January 15 prehearing conference that he would accept the amendment and sever the application. By subsequent order, FCC 73M–110, released January 26, 1973, he formalized his verbal ruling with respect to the Southeast petition; and granted the Wagner application.

2. The Broadcast Bureau has appealed from this ruling of the Presiding Judge.[1] It contends that Southeast could have filed its amendment as much as three years before the proceeding was designated for hearing. The Bureau argues that it should have been apparent to Southeast that, even though its application for Dermott and Wagner's

[1] The Board also has before it for consideration: oppositions to the Broadcast Bureau appeal, filed by Southeast and Wagner on February 7 and 8, 1973, respectively, and the Broadcast Bureau's reply, filed February 15, 1973.

application for Pineville, Louisiana, continued to be mutually exclusive with Robinson's application for Monroe, the Pineville and Dermott proposals could be granted if an appropriate amendment were filed; this would have permitted the grant of two applications in this proceeding as opposed to one without the amendment. The Bureau also notes that Southeast had requested that it be reimbursed for $2,000.00 of the approximately $6,000.00 which it anticipates would be expended by it to modify its directional antenna proposal. This, the Bureau contends, is not proper, since reimbursement for expenses after a conflict has been removed has not been permitted in the past.

3. The Broadcast Bureau's appeal will be granted; and the Presiding Judge's order granting the petition for acceptance of the amendment, severence of the applications and grant of Southeast's application for a new station in Dermott, Arkansas, set aside; our reason for this action, however, is not that advanced by the Bureau. Section 1.525 of the Commission's Rules applies:

> Whenever applicants for a construction permit for a broadcast station enter into an agreement to procure the removal of a conflict between applications pending before the Commission by withdrawal or amendment of an application.

The proposal advanced by Southeast in this situation appears to fall under the purview of the Rule, and since Southeast's petition does not comply with the requirements set forth in Section 1.525 of the Commission's Rules,[2] it must be denied.

4. One other matter warrants discussion. Since the Bureau has raised questions concerning the propriety of the amendment tendered by Southeast, the Board is of the view that the orderly and expeditious resolution of this proceeding may be facilitated by resolving those questions at this time. It is clear that Southeast has not literally complied with the requirements of Section 1.522(b) of the Commission's Rules. However, good cause should be construed in the light of the principal purpose of the Rules—to prevent undue disruption to the orderly processes of the Commission's administrative functions—and such determination depends on the facts in each case, *Circle L., Inc.*, 7 FCC 2d 494, 9 RR 2d 854, 858. It is also significant that the specific requirements for the acceptance of post designation engineering amendments were enacted to prevent applicants from withholding engineering amendments to their applications until after designation for hearing in order to avoid the risk of having a new file number assigned, *Report and Order Regarding Engineering Amendments*, FCC 60-280, 19 RR 1599. In our view, the facts here do not warrant denial of Southeast's petition for leave to amend. The amendment would not result in new or changed interference problems and would not have required the assignment of a new file number had it been filed prior to designation. Thus the specific abuse which the requirements of Section 1.522(b) were designed to prevent is not present in this case. Nor would the amendment result in the addition of new parties or issues or change the existing issues. Moreover, a grant of the amend-

[2] For example, the applicants did not file a joint petition for approval of agreement or the agreement containing all of the information required by Section 1.525(a) of the Rules.

ment would not prejudice any party to the proceeding but would obviate a need for hearing on the 307(b) issue, permit an immediate grant of Wagner's application, and greatly simplify the issues with respect to Southeast's application. In these circumstances, the Board agrees with the Presiding Judge's decision that the tendered amendment may be accepted (after the parties have complied with the procedural requirements of Section 1.525(b) of the Commission's Rules). See *Radio Collinsville, Inc.*, 17 FCC 2d 171, 15 RR 2d 1196 (1969). Finally, we cannot agree with the Bureau's contention that since in this case only one application is amended and only one application can be granted immediately, the holding in *Radio Collinsville, Inc.* is not applicable.

5. Accordingly, IT IS ORDERED, That the Broadcast Bureau's appeal of adverse ruling, filed February 2, 1973, IS GRANTED; and that the Presiding Judge's Order, FCC 73M–110, released January 26, 1973, IS SET ASIDE.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–123

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WESTERN COMMUNICATIONS, INC. (KORK–TV), LAS VEGAS, NEV. For Renewal of License	Docket No. 19519 File No. BRCT–327
LAS VEGAS VALLEY BROADCASTING CO., LAS VEGAS, NEV. For Construction Permit for New Television Broadcast Station	Docket No. 19581 File No. BPCT–4465

MEMORANDUM OPINION AND ORDER

(Adopted March 19, 1973; Released March 23, 1973)

BY THE REVIEW BOARD:

1. On January 18, 1973, Western Communications, Inc. (Western), filed its sixth motion to enlarge issues in this proceeding, requesting the Board to add the following issues: [1]

> To determine whether Mr. Meyer (Mike) Gold, Vice President, Director, 12.5% stockholder/subscriber and proposed full-time general manager of Las Vegas Valley Broadcasting Co., made misrepresentations to the Commission, or exhibited lack of candor, concerning his reasons for assigning his licenses for KLUC and KLUC–FM in December, 1969, and the effect of these matters on the qualifications of Valley to be a licensee.
>
> To determine whether grant of the application of Las Vegas Valley Broadcasting Co. for Channel 3 in Las Vegas would be in violation of Section 73.636(a) of the Commission's Rules, or in violation of the Commission's "cross-interest" policy.

2. Western alleges that Meyer (Mike) Gold, a Vice President, a member of the Board of Directors, and a 12.5% stock subscriber and proposed full-time general manager of Las Vegas Valley Broadcasting Co. (Valley), as an individual formerly was the licensee of Stations KLUC and KLUC–FM, Las Vegas, Nevada, and that on December 23, 1969, he tendered applications to assign those licenses to others, stating as his reason for the transfer:

> "assignor desires to concentrate his time on the operation of station KLOM, Lompoc, California, of which he is president and 50 percent owner, and to develop a new syndicated program service."

Petitioner alleges that Gold has not in fact concentrated his time on the operation of KLOM in Lompoc nor has he developed a new syndicated program service or tried to do so. Moreover, Western notes that in Gold's deposition in the instant proceeding, taken January 8, 1973, he

[1] The Board also has before it the Broadcast Bureau comments, filed January 31, 1973; Valley's opposition, filed February 22, 1973 and a reply to the opposition, filed by Western on March 5, 1973.

stated that after the sale of his Las Vegas radio stations, his only other business interest was KLOM; that he had more time on his hands which he devoted to his hobbies; that he devotes only 10 or 15 days out of the year at the most to KLOM; and that he now spends a little less time on the affairs of the KLOM station than he did before he sold his Las Vegas station. Moreover, Western notes that Gold stated on deposition that he sold his Las Vegas stations, which were not for sale at the time, because he received an offer that was so attractive. Under these circumstances, Western contends, a misrepresentation issue must be added to this proceeding.

3. In opposition, Valley contends that Western's petition is late filed and that Western has not shown good cause for its delay. Valley submits an affidavit of Gold, who states that at the time he sold the Las Vegas stations, he did in fact intend to devote substantial time to the affairs of KLOM; however, after a trip to Lompoc, he ascertained: that the area was somewhat depressed, that his partner was doing an excellent job in operating the station, and that no useful purpose would be served by devoting his full time to the station's affairs. Moreover, Gold contends that the transcript of his deposition supports his contention that he and his son, Steven, did devote considerable effort to the development of a syndicated program service which did not prove to be successful.

4. On the current state of the record before us, the requested issue will be included in the proceedings. There are a number of inconsistencies among Gold's statement made at the time he transferred his station, at his subsequent depositions, and in his affidavit filed with the Review Board. In view of these inconsistencies, the questions can best be resolved in the context of the hearing process.

5. Western also requests addition of an issue to determine whether a grant of Valley's application would be in violation of Section 73.636 (a) of the Commission's Rules or of the Commission's "cross-interest" policy. In support of this request, Western alleges that Steven J. Gold, who is the son of Meyer (Mike) Gold is a 51% stockholder, president, director and general manager of Broadcast Associations, Inc., licensee of standard broadcast Station KBMI, Henderson, Nevada; that Las Vegas and Henderson are located approximately 15 miles apart and that the entire city of Henderson lies within the proposed principal city and Grade A contours of Valley's proposed television station. Western notes that Section 73.636(a) and the related cross interest policy precludes the same person from acquiring an interest in both an AM and TV station serving substantially the same area, and argues that, although Steven Gold is not an officer, director, stockholder or employee of Valley, the nature of the relationship between Steven Gold and his father and mother is such that a cross interest issue should be added. More specifically, Western relies on the facts that Steven Gold is 28 years of age, unmarried, that he has resided with his parents at their home for the past several years, and that he will apparently continue to reside with them. Western also contends that Steven Gold and his parents have a record of close knit relationships in the broadcasting business; that Steven Gold was employed full time at Stations

KLUC and KLUC–FM until those stations were sold by Meyer Gold; that Steven Gold did not continue his employment at those stations after their sale; and that, after the sale of the stations, Steven Gold was largely unemployed until he purchased his interest in Station KBMI. Western alleges further that there is a creditor/debtor or other form of intimate financial relationship between Steven Gold and his interest in KBMI, on one hand, and his mother and father on the other hand. In this regard, Western notes that Steven Gold relied upon a $52,000 promissory note from his father to him, and a $10,000 loan from his mother for his financial contribution to Broadcast Associates. Moreover, Western contends that KBMI and Valley have a common mailing address; that Steven Gold's accountant, W. Irving Haut, is the treasurer, a director and a 12.5% stockholder in Valley, that the September 30, 1971 balance sheet of Mr. and Mrs. Meyer Gold filed with the KBMI amendment of April 3, 1972 is the same balance sheet filed by Meyer Gold with Valley's application five or six months earlier, and that the demographic survey relied on in the KBMI is the same demographic survey relied on by Valley, except that on three of the four pages of the copy used for KBMI, the Valley exhibit numbers have been lined through with pen or pencil. In these circumstances, Western contends, an issue to determine whether a grant will be in conflict with the Commission's Rules or its cross interest policy should be added to the proceeding.

6. The requested issue will be denied. Initially, the Board agrees with Valley that the request for this issue is untimely and that good cause for the delay has not been shown. Although Western contends that the matters relied upon were not available to it prior to Mr. Gold's deposition, it is apparent that these circumstances are such that Western could have, with due diligence, known of them in time to file a timely request for the issue. As to the merits of the request, Steven Gold is not a stockholder-subscriber, officer, director or employee of Valley. Nor do either of his parents hold any position with or stock in Broadcast Associates. Moreover, based on our examination of the pleadings, we are not satisfied that the relationship between Steven Gold and his parents is such as to warrant the requested issue. It is clear from the affidavits filed with the opposition that as of that date Steven Gold was not financially dependent upon his parents. The $52,000 note to Steven Gold was given to him by his father as a bonus for past service and the loan from his mother has been fully repaid. Thus, no debtor-creditor relationship exists. Nor do we find grounds in the other circumstances alleged to warrant inclusion of the requested issue. The Commission has consistently held that family relationship alone is insufficient to create a presumption of common control, and the allegations relied on by the petitioner show little more than an ordinary family relationship. *Cf. Community Broadcasting Co. of Hartsville*, 16 FCC 2d 891, 15 RR 2d 1093 (1969); and *L & S Broadcasting Co.*, 6 FCC 2d 535, 9 RR 2d 423 (1967).

7. Accordingly, IT IS ORDERED, That the sixth motion to enlarge issues, filed by Western Communications, Inc., on January 18,

1973, IS GRANTED to the extent indicated herein, and IS DENIED in all other respects; and the issues ARE ENLARGED as follows:

To determine whether Mr. Meyer (Mike) Gold, Vice President, Director, 12.5% stockholder/subscriber and proposed full-time general manager of Las Vegas Valley Broadcasting Co., made misrepresentations to the Commission, or exhibited lack of candor, concerning his reasons for assigning his licenses for KLUC and KLUC–FM in December, 1969, and the effect of these matters on the basic or comparative qualifications of Valley to be a licensee.

8. IT IS FURTHER ORDERED, That burden of going forward with the evidence under the issue added herein is on Western and the burden of proof is on Valley.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–120

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WESTERN COMMUNICATIONS, INC. (KORK–TV), LAS VEGAS, NEV. For Renewal of License	Docket No. 19519 File No. BRCT–327
LAS VEGAS VALLEY BROADCASTING CO., LAS VEGAS, NEV. For Construction Permit for New Television Broadcast Station	Docket No. 19581 File No. BPCT–4465

MEMORANDUM OPINION AND ORDER

(Adopted March 16, 1973; Released March 23, 1973)

BY THE REVIEW BOARD: BOARD MEMBER NELSON CONCURRING IN RESULT.

1. This proceeding involves the mutually exclusive applications of Western Communications, Inc. (Western), for renewal of its license for Station KORK–TV, Channel 3, Las Vegas, Nevada, and Las Vegas Valley Broadcasting Co. (Valley), for a construction permit for a new television broadcast station to operate on Channel 3, Las Vegas, Nevada. Now before the Review Board is a petition to enlarge issues, filed October 6, 1972, by Valley, which requests disqualifying and comparative issues inquiring into alleged fraudulent billing practices, network clipping and false sponsorship identification at stations wholly-owned or operated by Donald W. Reynolds, the owner of Station KORK–TV, as well as disqualifying and comparative issues relative to Western's efforts to ascertain community needs and interests.[1]

BILLING, CLIPPING AND SPONSORSHIP IDENTIFICATION ISSUES

2. A brief statement of the history of this proceeding will facilitate an understanding of the Board's present disposition of the requested issues. Western is owned by Donrey, Inc., which is wholly-owned by Donald W. Reynolds, who also owns or controls Station KFSA–TV, Ft. Smith, Arkansas, and Station KOLO–TV, Reno, Nevada. As a result of complaints filed with the Commission, an investigation was initiated which resulted in a letter to Western, FCC 72–75, dated January 26, 1972, detailing various alleged instances of network clipping [2] at all three stations, and fraudulent billing practices with local

[1] Also before the Board are the following related pleadings: (a) Broadcast Bureau's comments, filed November 20, 1972; (b) opposition, filed November 27, 1972, by Western; and (c) reply, filed December 22, 1972, by Valley.

[2] The instances of network clipping included discontinuing the broadcast of network programs before their completion, joining programs after they had begun and expanding station breaks within network programs so as to fail to carry such programs in their entirety and, then, falsely representing to the networks that each of the programs was broadcast in its entirety.

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businesses and false sponsorship identification in certain political announcements at Station KFSA–TV. Subsequently, on June 9, 1972, the Commission issued a Notice of Apparent Liability to Station KFSA–TV, FCC 72–502, for a forfeiture in the amount of $5,000; thereafter, the forfeiture was paid in full. The application for renewal of license for Station KOLO–TV was granted without hearing on June 15, 1972, FCC Report No. 10731. The Commission did, however, designate the renewal application of Station KORK–TV for hearing by Order, FCC 72–503, 35 FCC 2d 517, on an issue to determine whether it had engaged in fraudulent billing practices by network clipping, as well as a misrepresentation and candor issue. A subsequent Order, FCC 72–767, released September 1, 1972, consolidated Valley's application with the KORK–TV renewal proceeding under the same issues, and a comparative issue.

3. Citing the above-described Commission investigation, information contained in the letter to Western and the Notice of Apparent Liability issued to and paid by KFSA–TV, Valley contends that a consistent pattern of conduct by stations under common ownership is evidenced, and "must raise questions as to the principal licensee's character and qualifications to remain a Commission licensee." Furthermore, argues Valley, it is significant that after Western's response to a Commission letter of May 14, 1971, transmitting certain viewer complaints of clipping, the other commonly-owned stations continued clipping, at least through June, 1971, the end of the period covered by the Commission investigation. Such violations by other stations owned by an applicant, argues Valley, are clearly a proper basis for addition of qualifying issues in a comparative hearing, regardless of whether such violations have resulted in a forfeiture, citing, *e.g.*, *Harvit Broadcasting Corp.*, 31 FCC 2d 876, 22 RR 2d 1062 (1971); and *DuPage County Broadcasting, Inc.*, 21 FCC 2d 395, 18 RR 2d 321 (1970). Valley concludes that the above circumstances represent a consistent pattern of "deliberate fraud" requiring disqualifying issues and, in the event Western is determined qualified to continue as a Commission licensee, a comparative issue for "evaluation of the licensee's overall broadcast record."

4. The Broadcast Bureau agrees with Valley that the Commission investigation provides an adequate basis for adding issues inquiring into network clipping at KFSA–TV and KOLO–TV, and into the local double billing at KFSA–TV. The Bureau believes that the "cumulative impact of *all* the violations" should be considered on both a disqualifying and comparative basis. The Bureau does not believe, however, that the violations of Stations KOLO–TV and KFSA–TV, standing alone, can determine whether Western is basically qualified because of the Commission's actions regarding these stations. As for the alleged sponsorship identification violations, the Bureau is satisfied that Western's response to the Commission inquiry was sufficient to negate the need for that inquiry.

5. In opposition, Western initially opposes the requested issues on procedural grounds. Western's renewal application was first designated for hearing on June 9, 1972, *supra*, and the Order was published

in the Federal Register on June 22, 1972, 37 FR 12346; therefore, argues Western, since Rule 1.229 requires that petitions to enlarge be filed not later than 15 days after the issues "have first been published" in the Federal Register, Valley's petition is nearly three months late. Moreover, argues Western, Valley cannot "take advantage" of the fact that its application was not formally designated for consolidated hearing with the Western application until September 1, 1972, because Valley was well aware of the status of the Western renewal proceeding and its own interest therein, as evidenced by various other pleadings filed and, concludes Western, it was therefore Valley's obligation to intervene and file a timely petition to enlarge. Substantively, Western argues that Valley's request is defective because it seeks to add issues pertaining to alleged rule violations which have already been fully considered by the Commission. Specifically, Western notes that all of the information relied upon by Valley was available to the Commission prior to either the June 9, or the September 1, 1972, designation Order, and the Commission must have concluded that no action was necessary. In this regard, Western relies heavily on Commissioner Johnson's dissenting opinion to the June 9, 1972, designation Order, which was based on the Commission's decision not to issue an Order to Show Cause why KFSA–TV's license should not be revoked nor to take any action against KOLO–TV. Western also points to the Notice of Apparent Liability issued to KFSA–TV, arguing that both it and Commissioner Johnson's dissent clearly indicate that the Commission gave full consideration to the matters raised by Valley and that, therefore, the Board is precluded from reconsidering such matters, citing *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 8 RR 2d 991 (1966). Moreover, contends Western, *Harvit Broadcasting*, *supra*, and *DuPage County Broadcasting*, *supra*, are inapposite because in those cases additional or continuing rule violations were brought to light *after* designation. Finally, argues Western, the orderly presentation of evidence would be disrupted if rule violations issues at KFSA–TV and KOLO–TV are added, because meritorious programming issues regarding those stations would also have to be added, citing *Friendly Broadcasting Co.*, 35 FCC 2d 611, 24 RR 2d 712 (1972).

6. In reply, Valley urges that it could not have filed a petition to enlarge prior to the issuance of the consolidated designation Order because it was not a party to the proceeding (Rule 1.229(a)), and that it was not required to intervene because, in the Order, released June 12, 1972, the Commission indicated that, if Valley wished to prosecute its application on a comparative basis, a subsequent Order would be issued. Moreover, argues Valley, the Order released September 1, 1972, clearly stated that the issues there designated superseded the previously specified issues. Substantively, petitioner argues that neither the "mere consideration by the Commission" of the matters at issue nor the Notice of Apparent Liability precludes addition of the requested issues so long as factual matters relating to the qualifications of an applicant remain unresolved, as they do here. Whether violations come to light "prior to or subsequent to designation . . . is immaterial", petitioner contends, so long as the Commission did not provide

a "reasoned analysis," citing *Atlantic, supra.* Valley concludes that no such analysis has been provided by the Commission, and therefore urges the Board to add the requested issue (citing *National Broadcasting Co., Inc.*, 21 FCC 2d 195, 18 RR 2d 74 (1970)).

7. The Board will add the issues relating to fraudulent billing practices and network clipping at Stations KFSA–TV and KOLO–TV; however, in light of previous Commission actions, the issues will be added on a comparative basis only. The requested sponsorship identification issue will be denied. As to the timeliness of Valley's petition, the Board believes that, while Valley may have technically been under an obligation to seek timely intervention subsequent to the release of the June 12, 1972 designation Order, in view of the language of the June 12 Order indicating that the proceeding would be redesignated if a proposed merger was terminated, and the fact that the proceeding was redesignated, the petition should be treated as having been timely filed. *Cf. WPIX, Inc.* (*WPIX*), 34 FCC 2d 419, 24 RR 2d 59 (1972), review denied FCC 72–616, released July 12, 1972. Turning to the merits of the petition, the Board is of the view that the question of the effect on Western's basic qualifications of the alleged fraudulent billing practices and network clipping at KFSA–TV and KOLO–TV, as detailed in the Commission letter dated June 9, 1972, and the Notice of Apparent Liability issued to KFSA–TV, was resolved by the Commission when the license renewal application of KOLO–TV was routinely granted and the Notice of Apparent Liability issued to KFSA–TV. The timing of these actions, considered in light of Commissioner Johnson's dissent to the Commission Order, released June 12, 1972, in which he urged the issuance of an Order to Show Cause to KFSA–TV and designation of KOLO–TV's renewal application for hearing, clearly indicates that the Commission considered the consequences of the alleged violations in question in designating this proceeding for hearing. The Board cannot agree with Western, however, that the Board is precluded from adding issues inquiring into these matters on a comparative basis in this proceeding. These allegations, taken together with the allegations in the instant case, raise a substantial question as to whether individual acts or a consistent pattern of misconduct of substantial proportions over a relatively lengthy period of time by three stations under common ownership has occurred. The consequences of such actions are clearly relevant to the comparative qualifications of Western. Nor is the Board precluded by the doctrine set forth in *Atlantic, supra*, because the prior Commission actions relate to the individual stations and the effect of the alleged violations on the basic qualifications of the licensees. These matters are clearly separate from the question of Western's comparative qualifications and, consequently, there can be no "reasoned analysis" in the Orders designating the KORK–TV application for hearing.

8. In our view, the *NBC* case, cited by the petitioner, supports our conclusion that, although we are are not barred from allowing consideration of these alleged violations on a comparative basis, their effect on Western's basic qualifications has already been determined. In that case, involving the renewal of an NBC station in Los Angeles, the Board added disqualifying issues inquiring into the circumstances

surrounding certain allegedly misleading programs produced and presented by NBC, even though, as noted by petitioner, the Commission had previously renewed the license for the NBC station in New York. However, the Board believes this aspect of the case to be inapplicable to the present proceeding because, in granting the New York renewal application, the Commission had indicated that the allegedly misleading programs were being considered in the Los Angeles proceeding and, in a footnote to the Los Angeles proceeding designation Order, indicated the programs would "be considered in this proceeding." No comparable circumstances are present in this proceeding. Rather, in our view, the present circumstances more closely parallel another aspect of the same *NBC* case where the Board, when presented with requests for disqualifying issues pertaining to other allegedly misleading programs, indicated that such requests must be denied due to previous adjudication of such matters, including appropriate sanctions and subsequent renewal of all the NBC licenses at least once; the Board indicated, however, that these matters could be considered on a comparative basis. 21 FCC 2d at 204, 18 RR 2d at 85. Here, the Commission has also imposed sanctions with regard to one, and renewed the license of the other, offending station. And, like the *NBC* case, the Board is nevertheless of the view that the allegations can be considered in the comparative evaluation of the two applicants. Finally, as to the requested sponsorship identification issue, we agree with the Broadcast Bureau that Western's March 20, 1972, response to the Commission's inquiry adequately dispels the need for further inquiry. That response indicates that it identified the main contributors to the candidates' campaigns as the sponsors because neither candidate had established a formal campaign committee. It therefore appears that KFSA–TV acted in good faith and without intentional wrongdoing and that further inquiry would serve no useful purpose.

SUBURBAN AND COMPARATIVE EFFORTS ISSUES

9. In support of the requested ascertainment issue, petitioner initially alleges that Western has relied upon "outdated" census figures and county school registration records which have resulted in inaccurate population and minority group statistics, citing the *Primer* (Q. & A. 9).[3] Thus, argues Valley, Western has no valid basis for determining the composition of its community of license. Petitioner urges that the inaccuracies are demonstrated by comparing Western's figures with 1970 U.S. Census statistics. For example, argues Valley, Western's renewal application places more than 50% of Clark County's population in Las Vegas, whereas the 1970 Census reduces that figure to 46%; in addition, Western's application projects 7% of the population in North Las Vegas, 6% in Henderson and 3% in Boulder City, while the 1970 Census indicates that those communities have 13%, 6% and 1.9%, respectively, of the population. Valley points to similar discrepancies in the minority group breakdown. Petitioner also contends

[3] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 682, 21 RR 2d 1507, 1541 (1971).

that the use of outdated statistics has resulted in an "imbalance" in Western's community leader survey because the communities listed above did not receive adequate examination. Finally, Valley asserts that, even though Western's service area has a 5.5% Spanish-surnamed population, no leader was contacted "who could truly be classified" as a member of that minority. Valley also contends that its ascertainment efforts are sufficiently superior to those of Western's to require a comparative efforts issue. In support of this contention, Valley alleges that it utilized a much wider range of current sources in compiling its population statistics and in the number and breakdown of its community surveys. In this regard, Valley notes that Western interviewed only 84 community leaders, 80 of whom reside in Las Vegas, and 145 members of the general public, with little or no breakdown into smaller, more revealing groups. In contrast, argues petitioner, it interviewed 198 community leaders, 16 of whom reside in the smaller communities surrounding Las Vegas, and 211 members of the general public. In addition, Valley contends, the community leaders it interviewed, unlike those of its opponent, are broken down into representative minority and ethnic groups. In conclusion, Valley argues that all of the above requires a disqualifying *Suburban* issue against Western and a comparative efforts issue in the event Western satisfies the disqualifying issue.

10. In opposition, Western initially responds to Valley's attack on its alleged inaccurate statistics by arguing that the 1970 Census data was not available, at least in part, at the time it conducted its prerenewal survey. Moreover, argues Western, its total population estimate was based on an approximate 10% per year increase since 1960, which percentage is reflected in the current Census data, and, therefore, Western's 1971 estimate of 300,000 for the population of Clark County is more current and accurate than Valley's use of the 1970 Census figure of approximately 273,000. As to the minority percentages, Western argues that its estimate of a larger black population (13%) than the 1970 Census determined (9.1%) is not a basis for penalty, and the difference in Mexican-American population percentages (3.5% by Western and 5.5% by 1970 Census) is insignificant. With regard to its estimates of the populations in the smaller communities surrounding Las Vegas, Western argues that the percentage differences from the 1970 Census are similarly insignificant and that, in the absence of any current data, Western's estimates represent a good faith and adequately accurate attempt to comply with the *Primer*. In reference to its community leader surveys, Western argues that its first survey was adequate but that, in addition, the Presiding Judge accepted a Western amendment by Order, FCC 72M–1320, released October 24, 1972, which clearly demonstrates compliance with the *Primer*. This amendment shows consultations with 124 more community leaders, including those representing the smaller communities and minority groups. Finally, Western opposes Valley's request for a comparative efforts issue on the grounds that all of the above demonstrates that Western's ascertainment efforts are not defective and, in fact, are in many respects superior to those of Valley. The Broadcast

Bureau opposes addition of both issues, basically for the reasons stated by Western.

11. The Review Board will deny the requested issues. In reference to the requested *Suburban* issue, the Board believes that the Western amendment sufficiently dispels any doubt as to the adequacy of Western's surveys and showing. See *e.g.*, *Eastern Broadcasting Corp.*, 31 FCC 2d 724, 22 RR 2d 966 (1971). In all, Western interviewed 226 community leaders with a fair and representative percentage of minorities, as well as of the smaller communities in the area. As to the population figures and minority percentages derived therefrom, the Board believes that the percentage disparities are not sufficient to require addition of a *Suburban* issue—particularly since 1970 Census data does not appear to have been readily available and the methods used by Western to estimate the population percentages were reasonably explained and substantially accurate.[4] In view of the above determination and after a review of Valley's ascertainment efforts, the Board is similarly of the opinion that no useful purpose would be served by adding a comparative efforts issue. Valley's central basis for comparison appears to be on numerical differences; however, the Western amendment substantially equalizes any imbalance of this nature. For example, Western has conducted 226 community leader interviews and 245 general public interviews, while Valley has contacted 220 community leaders and 311 members of the general public. Nor do the other differences suggest a significant disparity. Therefore, the Board will add neither of the requested issues.

12. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed October 6, 1972, by Las Vegas Valley Broadcasting Co., IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

13. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to include the following issues:

> 1. a. To determine whether the American Television Co., Inc., former licensee of Station KFSA–TV, Channel 5, Ft. Smith, Arkansas, owned wholly by Donald W. Reynolds, engaged in fraudulent billing practices in violation of Section 73.1205 of the Commission's Rules and Regulations, by sending invoices to distributors and manufacturers representing charges for advertising in excess of the amounts actually charged a local advertiser, and by certifying to the CBS and NBC Television Networks in certain documents that the licensee broadcast certain network programs in their entirety, including commercial content, whereas the licensee had deleted portions of said programs, including certain network commercial advertisements in the programs certified as having been broadcast in their entirety.

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[4] In this regard the Board finds significant the statement in the *Primer* (in reference to the number of persons who should be consulted) that,

> [N]o set number or formula has been adopted. Community leaders from each significant group must be consulted. A sufficient number of members of the general public to assure a generally random sample must also be consulted. The number of consultations will vary, of course, with the size of the city in question and the number of distinct groups or organizations. No formula has been adopted as to the number of consultations in the city of license compared to other communities falling within the station's coverage contours. (*Primer*, Q. & A. 14.)

b. To determine whether Nevada Radio-Television, Inc., licensee of Station KOLO–TV, Channel 8, Reno, Nevada, owned wholly by Donald W. Reynolds, engaged in fraudulent billing practices in violation of Section 73.1205 of the Commission's Rules and Regulations, by certifying to the CBS Television Network in certain documents that the licensee broadcast certain network programs in their entirety, including commercial content, whereas the licensee had deleted certain network commercial advertisements in the programs certified as having been broadcast in their entirety.

c. To determine the effect, if any, of the evidence adduced under the foregoing issues, considered individually or together with the evidence adduced under Issues 1(a), (b) and (c), on the comparative qualifications of Western Communications, Inc. (KORK–TV).

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-303

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF E. BOYD WHITNEY, LICENSEE OF RADIO STATION KRZE, FARMINGTON, N. MEX.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted March 13, 1973; Released March 19, 1973)

BY THE COMMISSION:

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated February 16, 1972 addressed to E. Boyd Whitney, licensee of Station KRZE, Farmington, New Mexico and (2) licensee's responses to the Notice of Apparent Liability dated March 22 and April 17, 1972.

2. The Notice of Apparent Liability for forfeiture in the amount of one thousand dollars ($1,000) was issued in this proceeding because of licensee's apparent willful or repeated failure to abide by the provisions of the station license for KRZE and violation of Section 73.87 of the Commission's Rules, by operating the station prior to authorized hours. The Notice stated that the proceeding was confined to violations occurring within one year prior to the date of its issuance.

3. Station KRZE is authorized to operate with power of five kilowatts in Mountain Standard Time as follows during the months of February, March, April and August:

February; 7:00 a.m. to 5:45 p.m.
March; 6:30 a.m. to 6:15 p.m.
April; 5:45 a.m. to 6:45 p.m.
August; 5:30 a.m. to 7:00 p.m.

The Notice of Apparent Liability indicated that the station was operated with the power indicated on dates and hours, Mountain Standard Time, as follows:

Date (1971)	Period (a.m.)	Power (watts)
February 1 through 28	6:00-7:00	250
March 1 through 31	6:00-6:30	250
April 25 through 30	4:59-5:45	5000
August 1 through 9	5:00-5:30	5000
August 11	5:15 5:30	5000
August 12	5:00-5:30	5000

4. In response to the Notice of Apparent Liability, the licensee does not deny that the station was so operated. However, he has enclosed

a copy of a telegram dated November 1, 1966 to KRZE from the Commission in which the Commission stated that it did not object to operation from 5:00 a.m. to sunrise with power of 250 watts. Additionally, the licensee states that KRZE underwent three inspections during which no mention of unauthorized operation was made by Commission inspectors. It should be noted that prior to August 15, 1967, pursuant to former Section 73.87 of the Rules, a standard broadcast station was permitted to operate with its daytime facilities between 4:00 a.m. and local sunrise unless notified by the Commission that such operation was not permitted. Effective August 15, 1967, Section 73.87 was amended and Section 73.99 of the Rules was adopted, requiring that an application be filed and that a grant be obtained from the Commission for a Presunrise Service authorization.[1] The records of the Commission for KRZE do not reveal that an application has ever been filed by the licensee under Section 73.99 of the Rules or that a Presunrise Service Authorization has ever been issued to the licensee in accordance with that Section. It is to be noted and emphasized that the Commission's November 1, 1966 telegram, a copy of which the licensee enclosed, stated that it was to be effective "until the resolution of matters involved in Docket 14419 . . ."; Docket 14419 was the proceeding regarding presunrise operation which resulted in the amendment of Section 73.87 and the adoption of Section 73.99 of the Rules referred to above. The adoption of Section 73.99 of the Rules thereby terminated the licensee's telegraphic permission to operate prior to the local sunrise times specified in the KRZE license. Regarding the licensee's reliance on the three inspections, a licensee is responsible for compliance with the Rules and will not be excused from violations by reason of the past failure of the inspector to cite the licensee for violations.

5. The licensee contends that a fine of $1,000 will impose a great hardship on him. However, we considered the financial condition of the licensee prior to the adoption of the Notice of Apparent Liability for forfeiture in this proceeding and only because of that reason fixed the amount of apparent liability less than the usual amount for violations of this type and extent. Regarding the licensee's immediate cessation of the presunrise operation, licensees will not be excused for violations by reason of corrective action. *Executive Broadcasting Corp.*, 3 FCC 2d 699 (1966).

6. We find that KRZE was operated repeatedly without authorization on the dates and during the hours above indicated in violation of the provisions of the station license and Section 73.87 of the Rules of the Commission. We are not persuaded to grant the request that the forfeiture be set aside or reduced. Since we have found the violations to have been repeated, it is not necessary that we make an additional determination as to the willfulness of these violations. *Paul A. Stewart*, FCC 63–411, 25 RR 375.

7. In view of the foregoing, IT IS ORDERED, That E. Boyd Whitney, licensee of Radio Station KRZE, Farmington, New Mexico, FOR-

[1] The effective date was August 15, 1967, but the changes became enforcible on October 29, 1967.

FEIT to the United States the sum of one thousand dollars ($1,000) for repeatedly failing to abide by the provisions of the station license for KRZE and Section 73.87 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Treasurer of the United States. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty (30) days from the date of receipt of this Memorandum Opinion and Order.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission shall mail a copy of this Memorandum Opinion and Order Certified Mail—Return Receipt Requested to E. Boyd Whitney, licensee of Radio Station KRZE, Farmington, New Mexico.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73R–125

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WHJB RADIO, A LIMITED PARTNERSHIP, GREENSBURG, PA. For Construction Permits	Docket No. 18868 File No. BP–17962

ORDER

(Adopted March 21, 1973; Released March 23, 1973)

BY THE REVIEW BOARD: NELSON AND KESSLER. BOARD MEMBER PINCOCK DISSENTING WITH STATEMENT.

1. The Review Board having under consideration (a) its Decision in this proceeding (39 FCC 2d 296), released February 2, 1973, denying the above-captioned application; (b) the petition for reconsideration filed by the applicant on February 16, 1973; (c) Broadcast Bureau's opposition to said petition, filed on March 9, 1973; and (d) the applicant's reply to said opposition, filed on March 15, 1973;

2. IT APPEARING, That, with said Decision, issued by a Panel of the Review Board, there was a Separate Concurring Opinion by one Board Member and a Dissenting Statement by another Board Member; that, in part, all three documents commented upon or discussed the applicability on the *Suburban Community* issue herein of the decision of the U.S. Court of Appeals in *Northern Indiana Broadcasters, Inc.*, v. *FCC*, 148 U.S. App. D.C. 327, 459 F.2d 1351 (1972); and that in its decision, the Court of Appeals stated that the Commission's precedents under its *Suburban Community* Policy leave an applicant devoid of any guidelines as to the type and degree of evidence required to rebut the Commission's *Policy Statement* and that it was incumbent upon the Commission to clarify the standards for implementing its *Suburban Community* Policy Statement; and

3. IT FURTHER APPEARING, That in its petition for reconsideration the applicant contends that considerations of fundamental fairness as required by the Fifth Amendment's Due Process clause commands that WHJB's application cannot be denied prior to clarification of the standards and affording WHJB an opportunity to meet these standards as clarified; and that it is incumbent on the Review Board in this proceeding either to clarify the guidelines or to certify this proceeding to the Commission for this purpose; and

4. IT FURTHER APPEARING, That there are other pending AM and FM cases before the Board involving the same or similar questions concerning (a) the Suburban Community issues; (b) how separate and

distinct the needs of a community must be to rebut the Suburban Community presumption; and (c) the type and degree of evidence required to rebut the presumption: and

5. IT FURTHER APPEARING, That it is debatable whether the Review Board has jurisdiction to comply with the above-stated holding of the Court (para. 2, *supra*) since the call for clarification and/or revised standards involves the formulation of policy, rather than an extension or modification of existing policy and, as such, is a matter exclusively within the Commission's power; that, in any event, the three separate opinions by participating members of the panel in the instant case reveal, on their face, wide gaps of irreconcilable opinion relating to the *Suburban Community* Policy, let alone the issues; that it is evident, therefore, that the instant case was decided on the basis of each participating member's own interpretation of the policy as each, respectively, construed "existing precedent"; that such "existing precedent" has been described by the Court in *Northern Indiana*, *supra*, as "murky"; and that, under all of these circumstances, this proceeding involves important issues of law and policy requiring Commission clarification; and

6. IT FURTHER APPEARING, That Commission clarification of these important issues and policy will not only expedite the subject proceeding, it will also expedite the disposition of other similar proceedings pending before the Board; and that such certification would, therefore, best serve the orderly and expeditious dispatch of the Commission's and the Board's business, as well as the ends of justice;

7. IT IS ORDERED, That, pursuant to Sections 0.361(b) and 1.106 of the Commission's Rules and Regulations, and Section 405 of the Communications Act of 1934, as amended, the petition for reconsideration, filed February 16, 1973, by WHJB Radio, a limited partnership, IS GRANTED in part; the Board's Decision (FCC 73R–53) in this proceeding, 39 FCC 2d 296, IS SET ASIDE; and that this proceeding IS CERTIFIED to the Commission for such further action as may be warranted.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF BOARD MEMBER DEE W. PINCOCK

In my view, the petition for reconsideration should be denied. A majority of the panel which heard the oral argument decided that WHJB's application must be denied. The only new matter of substance raised by WHJB is its novel contention that, because of an alleged lack of clarity in the Commission's criteria for deciding the 307(b) *Suburban* Community issues it was deprived of "due process". This argument is not persuasive to me. For, as was clearly stated in the majority opinion denying, WHJB's application, 39 FCC 2d 296, the Commission's Policy Statement [1] is clear and has been consistently applied by

[1] *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 6 RR 2d 1901 (1965), reconsideration denied 2 FCC 2d 866, 6 RR 2d 1908 (1966).

the Board, the Commission, and the Court.[2] *Dictum* in *Northern Indiana Broadcasters, Inc.*, 148 U.S. App. D.C. 327, 459 F. 2d 1351, 23 RR 2d 2113 (1972) (which affirmed the Review Board's denial of Northern Indiana's application for failure to meet its burden of proof under the *Suburban* Community issue), suggesting that some clarification may be in order, does not warrant departure from the Commission's well established policy. As recently as March 6, 1973, by Order (FCC 73–226), the Commission declined to review the Board's disposition of comparable issues in *Lebanon Valley Radio Inc.*, 35 FCC 2d 243, 24 RR 2d 586 (1972). I find no justification whatsoever for certification at this late stage of the proceeding. Neither the *dictum* in *Northern Indiana*, nor the personal dissatisfaction of individual board members with the results of the existing policy, warrants this action, which can only further delay resolution of a case which is already far too old.

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[2] Counsel for WHJB vigorously contended at oral argument that WHJB was prepared to rely on *Naugatuck Valley Service, Inc.*, 8 FCC 2d 755, 10 RR 2d 737 (1967), affirmed *sub nom. Northeast Broadcasting, Inc.* v. *FCC*, 130 U.S. App. D.C. 278, 400 F. 2d 749, 13 RR 2d 2102 (1968). The Board found that WHJB had failed to meet the tests set forth in that case.

F.C.C. 73R–118

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WIOO, INC., CARLISLE, PA.	Docket No. 19468 File No. BPH–6572
HOWARD J. HILTON, JOHN E. McGOWAN, AND JOHN E. HILTON, D.B.A. HILTON, McGOWAN, & HILTON, CARLISLE, PA.	Docket No. 19469 File No. BPH–6631
ALEXANDER CONTRACT AND SYLVIA CONTRACT D.B.A. CUMBERLAND BROADCASTING CO., CARLISLE, PA.	Docket No. 19471 File No. BPH–7404
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted March 16, 1973; Released March 22, 1973)

BY THE REVIEW BOARD:

1. The above-captioned mutually exclusive applications for an FM broadcast station in Carlisle, Pennsylvania, were designated for hearing by Commission Order, FCC 72–233, 34 FCC 2d 919, released March 24, 1972. Since then, the Board has added several issues against both WIOO, Inc. (WIOO) and Cumberland Broadcasting Company (Cumberland), including issues inquiring into the character qualifications of each.[1] Now before the Review Board are two petitions requesting the addition of more issues to this proceeding: (a) a further petition to enlarge issues, filed October 30, 1972, by WIOO;[2] and (b) a petition to enlarge issues, filed January 10, 1973, by WIOO.[3] The "further petition" requests the addition of the following five issues against Cumberland:

(a) To determine whether the hiring practices and policies of Cumberland Broadcasting Company will comport with equal opportunity employment requirements.

(b) To determine whether Cumberland Broadcasting Company may be relied upon to program its station as proposed, and in the best interests of the entire population of its service area, with particular reference to the black population.

(c) To determine the history of dealings of Cumberland Broadcasting Company's principals with blacks and the surrounding facts and circumstances.

(d) To determine whether the principals of Cumberland Broadcasting Company possess the requisite character qualifications to be a Commission licensee.

[1] See, *e.g.*, FCC 73R–45, 26 RR 2d 704, released January 31, 1973, and 37 FCC 2d 740, 25 RR2d 567, released October 19, 1972.

[2] The following related pleadings are also before the Board: (1) Broadcast Bureau's comments, filed November 14, 1972; (2) Cumberland's opposition, filed November 22, 1972; (3) Cumberland's supplement to its opposition, filed November 29, 1972; and (4) WIOO's reply, filed December 11, 1972.

[3] The following related pleadings are also before the Board: (1) comments of the Broadcast Bureau, filed January 23, 1973; (2) opposition of Cumberland, filed February 2, 1973; and (3) reply of WIOO, filed February 12, 1973.

(e) To determine, in light of evidence adduced under the foregoing issues, the effect thereof upon the comparative and absolute qualifications of Cumberland Broadcasting Company.

The January petition arose out of Cumberland's response to WIOO's further petition and requests the addition of an issue to determine whether Cumberland's principals knowingly submitted false information to the Commission. The requests will be considered *seriatim*.

WIOO'S FURTHER PETITION

2. In its October 30, 1972, petition, WIOO makes several allegations which purportedly evidence on the part of Cumberland principal Alexander Contract, a "clear pattern of discrimination and denial of opportunity", and which, in WIOO's opinion, demonstrate that Cumberland "would not in fact treat its black employees in the fair and non-discriminatory manner which Commission policy requires." WIOO also accuses Contract of salacious behavior with several women in Carlisle, contending that this conduct, too, reflects adversely on Cumberland's character qualifications. To support its allegations, petitioner relies on several affidavits and unsworn statements which it attaches to its petition. The affidavits and statements are from local residents who allege that they know Contract and who denounce him for various reasons (*e.g.*, racial discrimination, salacious behavior). WIOO deduces from this potpourri of complaints and denunciations that "[i]t would be completely unrealistic for the Commission to expect fair and sympathetic treatment of black persons, either as employees or as members of the public, by a station owner having the attitudes described here." Petitioner relies on *Chapman Radio and Television Co.*, 24 FCC 2d 282, 19 RR 2d 589 (1970) (hereinafter *Chapman* I), as precedent for inquiring into whether the hiring practices [4] comport with Commission policy, and *Chapman Radio and Television Co.*, 34 FCC 2d 159, 24 RR 2d 51 (1972) (hereinafter *Chapman* II), in support of the contention that Contract's rental practices as a Carlisle landlord [5] also "raise the most serious questions about the spirit in which Cumberland could reasonably be expected to follow equal employment policies." WIOO acknowledges that its request is filed "sometime after the original designation for hearing", but argues that it was unaware of the serious matters raised "until recently".

3. The Broadcast Bureau supports the addition of an issue with respect to Contract's employment policies, and also favors an evidentiary inquiry into allegations concerning Contract's discriminatory policies as a landlord. Citing *Chapman* II, the Bureau asserts that alleged past discriminatory conduct constitutes "clear cause for exploration by the Commission in the form of a more searching scrutiny of the applicant in this important respect." However, the Bureau does not concur with WIOO's request for a programming inquiry because, in the Bureau's view, the petitioner fails to show the shortcomings of Cumberland's proposal vis-a-vis the needs of the black community and

[4] Contract is the owner and operator of a Carlisle laundry business.
[5] Contract rents apartments in Carlisle.

neglects to substantiate its claims with supporting factual data. Finally, the Bureau recommends the use of "broad language" in framing an issue in order to facilitate "inquiry into the other allegations which have a reasonable relationship" to a determination of Contract's character qualifications.

4. Cumberland's opposition is based upon both procedural and substantive grounds. Cumberland first impugns the veracity of all of WIOO's affidavits and unsworn statements by charging that one affiant was paid by WIOO; Cumberland then points to the untimeliness of the petition wherein "good cause isn't ever mentioned"; and finally Cumberland suggests that the subject matter raised in the petition is more properly within the jurisdiction of the Human Relations Commission of the Commonwealth of Pennsylvania. On the merits, Cumberland denies that Contract has exhibited bias or prejudice, or ungentlemanly behavior. A number of affidavits and statements are submitted which purportedly illumine Contract's "true" relationship with the black community and which, in Cumberland's words, present "[h]ardly a picture of a racist or one who has discriminated with respect to race," but rather "one who has helped black people tremendously and treats them with fairness and respect."

5. In reply, WIOO characterizes Cumberland's charge with respect to the payment of an affiant as "hearsay" and "conjecture," and swears that no money was ever exchanged. WIOO submits that Contract's representations in the opposition are either unverified or unsubstantiated and that WIOO's allegations continue to raise questions of a sufficiently serious nature so as to necessitate an inquiry, citing the *Edgefield-Saluda* case.[6]

6. The Review Board will deny the requested issues. First, the petition is grossly late because more than seven months have expired since the designation Order was published on March 24, 1972, and because the facts relied upon allegedly occurred prior thereto. Further, petitioner's explanation that it was unaware of the matters raised "until recently" is too vague and less than adequqate to excuse the untimeliness. *WENY, Inc.*, 12 FCC 2d 606, 12 RR 2d 1160 (1968). The Board also agrees with Cumberland that the issues raised should be initially pleaded before the Pennsylvania Human Relations Commission, a local forum better suited to handle complaints of the nature submitted by WIOO. The Commission is, of course, very concerned about the specific allegations encompassing discrimination by applicants for broadcast licenses.[7] However, the allegations in WIOO's petition relate to conduct in a local business not *per se* within our jurisdiction, no action in an appropriate forum is pending, and the allegations themselves do not raise a serious question regarding discrimination. The Board has in the past ordinarily declined to intervene in matters of alleged violations of federal or local law where the matters have not

[6] The *Edgefield-Saluda Radio Co. (WJES)*, 5 FCC 2d 148, 8 RR 2d 611 (1966).

[7] "If a violation has been established, this clearly raises a question as to the applicant's qualifications" and ". . . even where no violation of a specific statute is established or alleged, specific allegations may raise serious public interest issues warranting a full hearing." *Notice of Proposed Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 FCC 2d 766, 769, 13 RR 2d 1645, 1650 (1968), and cases cited therein.

109-033—73——9

been presented to or acted upon by the authority charged with the responsibility of interpreting and enforcing those laws. See, *e.g.*, *Bangor Broadcasting Corp.*, 33 FCC 2d 687, 689, 23 RR 2d 883, 886 (1972); *Lamar Life Broadcasting Co.*, 26 FCC 2d 112, 120, 20 RR 2d 509, 520 (1970). Under the particular circumstances of this case, we are of the view that this principle should be applied here. Moreover, the charges, particularly those regarding proposed programming, amount to mere speculation and unsupported conclusions, and, as such, are insufficient to require the addition of an issue.[8]

7. Neither do the *Chapman* cases, *supra*, support the addition of an issue in this proceeding. In *Chapman* I, the Commission "deem[ed] it appropriate to delve into the matter of [the applicant's] employment policies" because of an adverse civil judgment, because of possible misrepresentations concerning the incident involved therein, and because of the applicant's "apparent failure to contact members of minority groups with regard to community needs. . . ." In *Chapman* II, an issue was added to inquire "into the significance of the civil judgment" entered against two of the applicant's principals for Civil Rights Act violations, in the evaluation of the applicant's qualifications, but inquiry was stayed pending resolution of an appeal from the civil judgment. In addition, the case was remanded to the Presiding Judge for a further hearing under an *existing* equal opportunity employment issue encompassing "an inquiry into the civil rights compliance of the companies owned by [the applicant's] directors. . . ." The important and distinctive elements are missing in the instant proceeding: there is no outstanding adverse judgment against Cumberland; there is none pending; and there is no existing equal opportunity employment issue. *Chapman* I and II are, therefore, inapposite.

WIOO'S JANUARY PETITION

8. Cumberland, in opposition to WIOO's further petition, charged that WIOO had purchased a sworn statement, and, in support, appended an affidavit of George Corbin, dated November 10, 1972, relating an allegedly incriminating conversation he had with the paid affiant, his brother. WIOO, in its reply, denied the allegation, and on January 10, 1973, filed a petition requesting the addition of an issue:

> To determine the circumstances under which Cumberland submitted the affidavit of "George Corbin" with its November 22, 1972 opposition, and in the light thereof, to determine whether Cumberland's principals knowingly submitted false information to the Commission.

In support, WIOO submits an affidavit of George Corbin, dated January 6, 1973, in which he relates that he was out of town on November 10, 1972 (the date of the alleged first Corbin affidavit), that he did not sign that affidavit, and further, that the facts regarding payment for the sworn statement are untrue. The notary public for the November 10 affidavit, states that the individual signing that affidavit, and the indi-

[8] The Board notes, and the petitioner as much as acknowledges, that Cumberland's survey includes members of the black community, including leaders thereof, and that the applicant has proposed certain programs which are apparently responsive to the needs and interests of that community.

vidual who appeared before him on January 8, 1973, are not the same person. The Broadcast Bureau supports the addition of the requested issue, urging that the serious public interest questions raised override the defect of untimeliness.[9] The Bureau also suggests the addition of an issue encompassing a determination of "the effect of a resolution of the requested issue on Cumberland's requisite and/or comparative qualifications" which, the Bureau points out, the Board did in adding a similar issue in this proceeding (37 FCC 2d 740, 25 RR 2d 567, released October 19, 1972).

9. In opposition, Cumberland characterizes WIOO's petition as a "total fabrication". George Corbin submits two more affidavits in which he swears that he is the same individual who signed all of the affidavits bearing the signature of "George Corbin"; that he now reaffirms his November 10th affidavit (submitted with Cumberland's opposition to the further petition); and that he repudiates the truth of the affidavits signed by him and submitted by WIOO with its January petition. Corbin claims that he signed the affidavits for WIOO while under the influence of alcohol offered to him by a WIOO principal, who also paid him. Cumberland submits a laboratory report of a document examiner who finds that all of the signatures of "George Corbin" were "written by the same writer". Cumberland concludes that if the issue is to be added at all, it should include a determination of "the facts and circumstances concerning the procurement of WIOO, Inc. of its January 6, 1973 affidavit and its January 8, 1973 statement."

10. WIOO, in reply, submits affidavits from one of its principals, from various witnesses and from its attorney, all of whom deny any wrongdoing on the part of WIOO, and attempt to rebut the countercharges asserted by Cumberland. WIOO notes Cumberland's suggestion to inquire into the circumstances surrounding the procurement of all of the affidavits in question, and "earnestly entreats" the Board to go into the "entire matter".

11. It appears from an examination of the affidavits submitted to the Board that someone may not be telling the truth regarding this matter and, because the glaring conflicts in the affidavits preclude our resolution of the serious questions raised, they must be resolved at the hearing. *Christian Voice of Central Ohio*, 26 FCC 2d 76, 81–82, 20 RR 2d 389, 395 (1970); *Sumiton Broadcasting Co., Inc.*, 15 FCC 2d 400, 404, 14 RR 2d 1000, 1005 (1968), and cases cited therein. Because both parties agree that *all* the matters raised should be subject to inquiry at the hearing, the Board will add appropriate issues against both Cumberland and WIOO.

12. Finally, the Board notes that, according to the Commission's files, no less than twenty-five interlocutory requests have been filed in this proceeding, giving rise to responsive pleadings, which, in turn, generate supplements and supplements to supplements, and more pleadings responsive thereto. This activity frustrates an orderly and efficient administrative process, and introduces unnecessary delay. In view of the plethora of pleadings filed in the instant proceeding, the

[9] In support, the Bureau cites *RKO General, Inc. (WNAC–TV)*, 30 FCC 2d 138, 22 RR 2d 178 (1971).

Board suggests that the parties may wish to reappraise their approach to the case, with the understanding that the ultimate determination will be based on facts of record rather than arguments and allegations contained in a seemingly endless chain of interlocutory pleadings. See *RKO General, Inc.* (*WNAC-TV*), 34 FCC 2d 736, 737, 24 RR 2d 200, 201 (1972).

13. Accordingly, IT IS ORDERED, That the further petition to enlarge issues, filed October 30, 1972 by WIOO, Inc., IS DENIED; and

14. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed January 10, 1973 by WIOO, Inc., IS GRANTED; and

15. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issues:

(a) To determine the facts and circumstances surrounding the procurement of the affidavits of Jerry Corbin and George Corbin in connection with the pleadings submitted by Cumberland Broadcasting Company and WIOO, Inc.

(b) To determine in light of the evidence adduced pursuant to issue (a), the effect thereof on the basic and/or comparative qualifications of Cumberland Broadcasting Company.

(c) To determine in light of the evidence adduced pursuant to issue (a), the effect thereof on the basic and/or comparative qualifications of WIOO, Inc.

16. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under the issues added herein SHALL BE on WIOO, Inc., and the burden of proof under issues (a) and (b) SHALL BE on Cumberland Broadcasting Company, and the burden of proof under issues (a) and (c) SHALL BE on WIOO, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-329

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of ZENITH RADIO CORP. (ASSIGNOR) and GCC COMMUNICATIONS OF CHICAGO, INC. (ASSIGNEE) Application for Voluntary Assignment of License for Radio Station WEFM-FM, Chicago, Ill.	File No. BAPLH-140

MEMORANDUM OPINION AND ORDER

(Adopted March 21, 1973; Released March 22, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONERS REID AND WILEY CONCURRING IN THE RESULT; CHAIRMAN BURCH ISSUING ADDITIONAL VIEWS IN WHICH COMMISSIONERS ROBERT E. LEE, H. REX LEE, REID, WILEY AND HOOKS JOIN.

1. By Memorandum Opinion and Order (FCC 72-1129), released December 21, 1972 (38 FCC 2d 838) the Commission granted the above-captioned application to assign the license of Station WEFM (FM) Chicago, Illinois from Zenith Radio Corp. to GCC Communications of Chicago, Inc. In the same Memorandum Opinion and Order we also denied a Petition to Deny and dismissed a "Complaint" filed by the Citizens Committee to Save WEFM et al. and the Citizens Committee to Save WEFM, Inc. et al. respectively.[1]

2. Now before us for consideration is a Petition for Reconsideration and a Motion to Stay the effectiveness of that Order filed on January 22, 1973 by the Citizens Committee to Save WEFM, Inc. et al. and related pleadings. On March 16, 1973 Petitioner filed a Motion for Stay in the Court of Appeals (the Notice of Appeal had been filed on January 17, 1973) and GCC has voluntarily postponed the date for changing WEFM's format from March 31 to April 7, 1973. In light of our action in disposing of the Petition for Reconsideration and the above-mentioned actions of the parties a ruling on the request for Stay is no longer required. It will therefore be dismissed as moot.

3. The Petition for Reconsideration does nothing more than claim as error our refusal to adopt the Petitioners' versions of the law and facts concerning this proposed assignment which contentions, except allegations of fairness doctrine violations discussed in paragraphs 10-13 *infra*, we fully considered and rejected in the subject Memorandum

[1] Subsequent to the filing of the Petition to Deny, the Citizens Committee incorporated. It is now the successor to the original Petitioner.

Opinion and Order. Nothing in the way of newly discovered information has been submitted, and no new reasons have been advanced which enhance Petitioners' position in any significant respect. Nevertheless, we have again reviewed all of the arguments and contentions of Petitioners in light of the responses of the applicants and applicable precedent and find no reason to disturb our earlier ruling. It is well settled that reconsideration will not be granted merely for the purpose of debating again matters upon which we have once deliberated and spoken. *WEOK Broadcasting Corp.* 4 RR 2d 503 (1965); *Pacific Foundation* 20 FCC 2d 648, 17 RR 2d 1073 (1969).

4. While we have determined to deny the Petition for Reconsideration, we will nevertheless take this opportunity to address ourselves to certain of Petitioners' basic contentions in order that there can be no misunderstanding of the basis for our rulings on these matters. Initially we note that a substantial portion of the Petition for Reconsideration is devoted to the argument that our failure to grant the Petition to Deny and order a hearing on this matter deprived Petitioners of their Constitutional and Statutory right to be heard and participate in our proceedings. Petitioners confuse the Statutory criteria which must be met before we may act with provisions of the Communications Act and our Rules, designed to insure that interested parties and the listening public may bring matters to our attention concerning pending applications which could assist us in reaching our public interest determination. Those latter provisions are not, however, a guarantee that the matters brought to our attention by them will raise substantial and material questions of fact which cannot be resolved without an evidentiary hearing.

5. Here, the fact that over a thousand members of the Chicago listening public wrote expressing their concern over the proposed change in format of WEFM and had their views considered by us in reaching a decision in this proceeding amply demonstrates that the right to be heard has been fully accorded. Similarly, Petitioners have availed themselves of virtually every applicable provision of the Act and our Rules in pursuing their claim that an evidentiary hearing should be held in this case. Within the statutory framework of our proceedings Petitioners' participation has been no less than that accorded the applicants in this case. Neither the Constitution nor the Communications Act requires more.

6. Petitioners, relying heavily on *Citizens Committee (WGKA) v. FCC* 436 F 2d 263, 20 RR 2d 2026 (1970), also urge, that as a matter of law, where as here, the assignee proposes to discontinue the classical music format presently being utilized by WEFM, an evidentiary hearing is required before we can reach a public interest determination. Such is not the case. In WGKA *supra* the court itself recognized that a licensee (or proposed licensee) "has considerable latitude in the matter of programming" (20 RR 2d at 2036); and that the unprofitability of an existing operation would be a key factor in leaving such licensee programming decisions undisturbed (*ibid.* at 2033). Finally, the Court itself construed and confined its ruling in *WGKA* to those cases where "the proposed programming changes from 100% classical music format deprived some portion of the listening public of pro-

gramming to which it was attached and for which there was no appropriate substitute". *Hartford Communications Committee et al* v. *FCC* 467 F 2d 408; 24 RR 2d 2160, 2166 (1972). It is thus clear, that a proposed change from a classical music format does not per se require an evidentiary hearing. We therefore turn to Petitioner's principal factual contentions upon which it claims an evidentiary hearing is necessary.

7. First it is contended that since Zenith's admitted minimum *after tax* losses from the operation of WEFM were in excess of $1 million rather than the nearly $2 million in *operating losses* initially claimed by Zenith, an evidentiary hearing is necessary in order to determine whether Zenith actually suffered any losses at all. Petitioner's reliance on these alleged differences in Zenith's losses is misplaced. There is no inconsistency in the two figures. The $1 million dollar figure represents the net dollar loss to Zenith *after* WEFM's actually operating losses had been offset by profits from Zenith's other business enterprises, whereas the amount of nearly $2 million represents the actual losses incurred by Zenith in the operation of WEFM during the last six years. It is these latter losses which are determinative here, since, as discussed *supra*, the Court in the WGKA case recognized that a key factor in determining whether an evidentiary hearing is required where a change of format is proposed is the unprofitability of the existing operation.

8. Here Petitioner has neither alleged any facts which would cast doubt on the reliability of the losses claimed by Zenith in the operation of WEFM nor has it seriously questioned those figures.[2] Moreover, the annual loss figures submitted by Zenith in this proceeding are identical to those submitted in WEFM's financial reports to the Commission (Form 324) for all of those years. Since the 324 information was submitted at times when Zenith's losses were not being questioned, and since no facts have been alleged which would cast doubt on their reliability, we hold that there is no substantial or material question of fact remaining with regard to the operating losses of WEFM during the last six years.

9. In the Petition for Reconsideration, Petitioners contend that there is no appropriate substitute for the classical music format provided by WEFM within its service area. In support of this contention Petitioners argue only that WNIB (another classical music station licensed to Chicago), because of its lower power, is unable to reach the same audience currently receiving classical music programming over WEFM. In making this argument, Petitioners ignore the existence of a third Chicago station providing classical music programming, WFMT. The audience served by WFMT, however, cannot be ignored. As the attached map [3] (prepared from Commission records and depicting the coverage areas of WNIB, WEFM and WFMT) demonstrates, WFMT in fact serves a greater area than does WEFM. Further, while WNIB does not provide service to all the audience reached by WEFM

[2] The operating losses for the last six years total $1,957,534 and losses for each of the years between 1969 and 1971 was over $300,000 (see paragraph 12 of the subject Memorandum Opinion and Order).

[3] Attachment A.

it does encompass all of the city of Chicago, its city of license. Moreover, secondary agreements between WNIB and GCC provide for the enrichment of the programming fare offered by WNIB and substantial assistance is to be provided in increasing that station's power. Clearly then, this is not a "format" change case where there is no appropriate substitute for the service being lost.

10. The Petitioners also urge upon reconsideration that Zenith improperly rejected their request that they be afforded an opportunity to discuss on the station the interest of the public in the permanent use of the channel for classical music and related cultural programs. This request was made in a letter dated August 16, 1972 (attachment B hereto) and was rejected by Zenith on the ground that the matter was in issue before the Commission and that an over-the-air discussion could be construed as an effort, directly or indirectly, to influence the Commission's action (see attachment C hereto). While Petitioners urge that an evidentiary hearing is required in connection with the transfer on the ground that their rights under the Constitution and the fairness doctrine were violated, we do not believe that the facts before us raise any question of substance. We believe that Zenith acted reasonably in light of applicable provisions of the Commission's rules relating to *ex parte* presentations. Under Section 1.1203 of the rules, the transfer proceeding was "restricted" as to Petitioners, as interested persons, upon the filing of the petition to deny. Section 1.1223 prohibits interested persons from making any oral or written *ex parte* presentations to decision-making Commission personnel, either directly or indirectly, and Section 1.1225 prohibits any person from soliciting or encouraging others to make any presentation which he himself is prohibited from making. Zenith therefore was properly concerned about making the station's facilities available to an interested person to discuss the subject of the pending petition to deny, because such use would raise questions of possible improper solicitation.

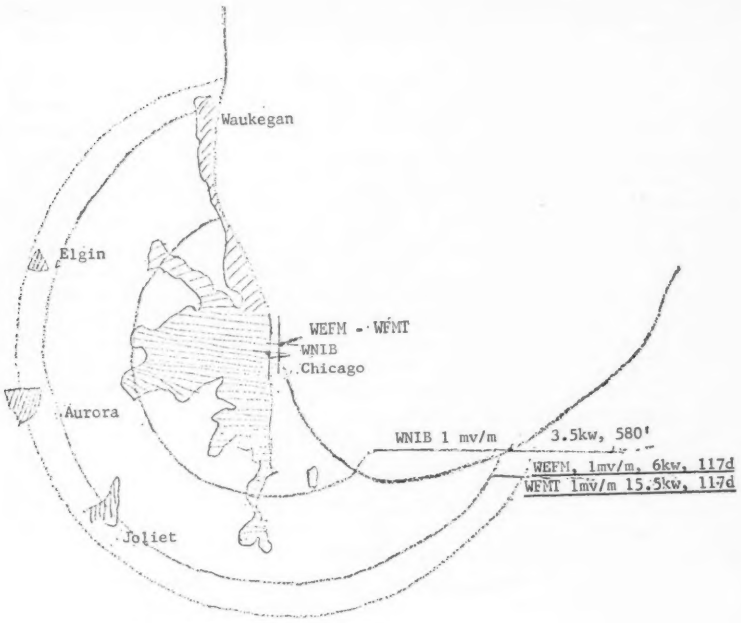
11. Furthermore, we have previously held that no particular person has a constitutional right of access to broadcast facilities. While the United States Court of Appeals for the District of Columbia Circuit reversed that ruling with respect to paid editorial announcements in *Business Executives' Move for Vietnam Peace* v. *FCC*, 146 U.S. App. D.C. 181, 450 F. 2d 642 [1971], the Supreme Court has granted certiorari and stayed the mandate of the Court of Appeals pending final resolution of the issue; we note also that the holding of the Court of Appeals was in any event specifically limited to brief paid announcements. Finally, with respect to Petitioners' reliance upon the fairness doctrine, Petitioners do not allege a failure on the part of the station to afford an opportunity to present views contrasting with views previously presented, but rather merely the refusal to afford them an opportunity to use the station's facilities for an initial discussion of the question of the station's proposed format change. We have set forth above our view that the station reasonably rejected the appearance of the Petitioners and that this rejection did not constitute a denial of any constitutional rights. While Petitioners do not go beyond the issue of Zenith's refusal to afford time in connection with the letter of August 16, 1972, we should add that we see no basis on the record before

us for disturbing the transfer on any theory that Zenith had an absolute duty to present over the air the issues raised by its pending application before the Commission.

12. In summary, while we indeed regret to see the demise of the classical music programming provided the Chicago area by Zenith over WEFM, this regret alone is an insufficient basis for the Commission to require an evidentiary hearing on this matter. We may properly look behind a licensee's (or proposed licensee's) programming judgments only where other facts exist which leave unresolved substantial or material questions of fact. In the format change cases, the two principle factors are profitability of the present operation and the availability of an appropriate programming substitute. Here, Zenith has suffered continuing and substantial losses while programming classical music and there are a minimum of one and a maximum of two other services providing classical music programming to the population within WEFM's primary service area. In light of these circumstances, we hold that no substantial or material question of fact remains requiring an evidentiary hearing.

Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed by Citizens Committee to Save WEFM, Inc. IS DENIED: That Petitioner's Motion for Stay, IS DISMISSED as moot; and our memorandum Opinion and Order which granted the application of Zenith Radio Co. to assign the license of Station WEFM, Chicago, Illinois to GCC-Chicago, Inc. is hereby AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*



Predicted 1 mv/m contours of FM Stations WNIB, WEFM and WFMT

ATTACHMENT B

CITIZENS COMMITTEE TO SAVE WEFM, INC.,
AUGUST 16, 1972.

GREGGAR P. SLETTELAND, ESQ.,
Zenith Radio Corp.,
Chicago, Ill.

DEAR MR. SLETTELAND: We take the liberty of writing you for the reason we believe your station has apparently overlooked the public importance of the public's rights to use radio channels, for the purpose of broadcasting classical music.

We are engaged in a significant aspect of this issue for this Committee, as part of its program is opposing the sale by Zenith Radio Corporation, of Station WEFM, to GCC Chicago, an affiliate of General Cinema Corporation. GCC Chicago proposes to abandon the historical classical music format of WEFM and substitute rock roll or popular music.

Although it is true that a substantial part of our efforts are currently centered on our demand that the FCC reject the proposed sale, or allow us a public hearing on this transaction, the overall interest of the Committee goes far beyond this proceeding. We are likewise committed to protection of the right of the public to permanent use of channels such as WEFM's 99.5, for classical music and related cultural programs.

The public interest in our program is demonstrated by letters of protest sent to the FCC and us by more than 1000 listeners, and petitions signed by approximately 7500 additional members of WEFM's audience, who oppose the conversion of WEFM into a rock roll station.

We believe that the above issues are of such importance to the vast number of FM and AM radio listeners, and the stations located in the Chicago Metropolitan Area, that your station should make it possible for us to discuss these issues as a public service broadcast over your station. Although we believe that your station should make available reasonable time to us for this Committee to discuss the rights of the public to classical music formats, the form and method by which these important problems can be discussed over the air can, I am sure, be worked out in a discussion with you and your staff.

We will appreciate hearing from you at your earliest convenience. Please reply to our 110 So. Dearborn St. office.

Very truly yours,

VERNON BOORMAN, *President,*
HARRY R. BOOTH, *Attorney.*

ATTACHMENT C

ZENITH RADIO CORP.,
SEPTEMBER 1, 1972.

HARRY R. BOOTH, ESQ.,
110 South Dearborn,
Chicago, Ill., 60603

Re: Radio Station WEFM (FM).

DEAR MR. BOOTH: Your letter of August 16, 1972 addressed to me as counsel—and showing carbon copies sent to the other counsel of record in the pending FCC transfer proceeding (File No. BPHL–140)—at first looked like a form letter which had been sent to Chicago broadcast stations other than WEFM, so I initially assumed it was merely an information copy to all counsel of record and put it in the file.

On further reflection, it has occurred to me that said letter may also have been intended as a request for time on Station WEFM. If it was so intended, the request is most inappropriately timed in view of the fact that the very issues proposed to be discussed on the air are now before the Commission for decision in an adjudicatory proceeding involving WEFM.

The final cut-off date for all filings in the FCC proceeding was extended to July 26, 1972, per your request, and we did not object to the extension. Thus you've had a full opportunity to present your case, both on the facts and on the law. Any further effort after July 26, 1972 to influence the Commission, directly or indirectly, could violate the Commission's Rules in several respects. One obvious risk is that any over-the-air forum on Station WEFM could be construed as an effort, directly or indirectly, to influence the Commission's action in such proceeding.

As you are aware, WEFM has not changed its classic music format, nor has it broadcast anything about the sale other than the required Legal Notice of the application having been filed with the FCC. Instead, Zenith elected to inform our regular listeners of our reasons for the sale by way of Mr. Kinney's May 2, 1972 letter to about 27,000 persons on the mailing list of those to whom the monthly WEFM program booklet had been regularly mailed before its discontinuance in 1971. Under these circumstances, as well as the adjudicatory circumstances mentioned above, there is no apparent justification for discussion over WEFM at this time of the issues you raised with the FCC.

Very truly yours,

ZENITH RADIO CORPORATION,
G. P. SLETTELAND,
Assistant General Counsel.

ADDITIONAL VIEWS OF CHAIRMAN BURCH IN WHICH COMMISSIONERS ROBERT E. LEE, H. REX LEE, REID, WILEY AND HOOKS JOIN

WEFM listeners have enjoyed the classical music offerings of that station for over three decades. And despite our action today, neither I nor my fellow Commissioners are unsympathetic to the deep concern expressed by many Chicago area residents over the demise of classical music programming on that station. For this reason, I feel that an explanation of the many policy considerations underlying our decision here is both appropriate and necessary.

The Commission's action in this case is in no way a reflection of the personal musical preferences of a majority of individual Commissioners. It represents, instead, our view of what the appropriate relationship between this agency and radio broadcasters should be in the entertainment program format area.

It would be a simple matter for the Commission to dictate to each licensee of the 62 stations in the Chicago area which entertainment format each should use. Such an approach might maximize—at least in the short run—the diversity of formats and types of programming available to the public. But it would not be the approach contemplated by Congress when it created the Commission in 1934. Broadcast stations are, of course, licensed to serve the public interest, but as the Supreme Court observed back in 1940, the Communications Act also "recognizes that the field of broadcasting is one of free competition." [1] In short, "[t]he regulatory responsibility of the Commission in the broadcast field essentially involves the maintenance of a balance between the preservation of a free competitive broadcast system, on the one hand, and the reasonable restriction of that freedom inherent in the public interest standard provided in the Communications Act, on the other."[2]

The Commission has struck this balance by requiring licensees to conduct formal surveys to ascertain the need for certain types of non-entertainment programming, while allowing licensees wide discretion in the area of entertainment programming. Thus with respect to the provision of news, public affairs, and other informational services to the community, we have required that broadcasters conduct thorough surveys designed to assure familiarity with community problems and then develop programming responsive to those identified needs.[3] In contrast, we have generally left entertainment programming decisions to the licensee or applicant's judgment and competitive marketplace forces. As the Commission stated in its *Programming Policy Statement*, 25 Fed. Reg. 7293 (1960), "[o]ur view has been that the station's [entertainment] program format is a matter best left to the discretion of the licensee or applicants, since as a matter of public acceptance and of economic necessity he will tend to program to meet the preferences of his area and fill whatever void is left by the programming of other stations."

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[1] *F.C.C.* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474 (1940).
[2] *Programming Policy Statement*, 25 Fed. Reg. 7293 (1960).
[3] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971).

In actual practice, the Commission has found that licensees in multi-station markets like Chicago frequently shift and modify their entertainment formats in response to changing listening tastes, competition, and financial necessity. In fact, we have frequently found that when a station changes its format other stations in the area adjust or change their formats in an effort to secure the listenership of the discontinued format.[4]

The discretion the Commission affords broadcasters allows for both experimentation in programming and the discarding of outmoded formats—steps which would be inhibited by "locking" broadcasters into their current formats. Indeed, one can only speculate how many Chicago licensees would adopt a classical music format, or any format appealing to minority tastes, if they faced the strong possibility that a lengthy and costly evidentiary hearing would be necessary before unsuccessful formats could be discontinued. Certainly no cautious communications attorney would recommend to his client the adoption of a programming format that experience has shown to be not only economically hazardous but likely to produce a lawsuit when and if a change is attempted. In short, inhibiting licensee discretion to change or modify unsuccessful program formats appealing to minority tastes will have, in my view, the effect of lessening the likelihood that such programming will be attempted in the first place. This makes neither good sense nor good law.

This is not to say, however, that licensees or applicants have unbridled discretion in selecting their entertainment formats. The Commission will take an extra hard look at the reasonableness of any proposal which would deprive a community of its only source of a particular type of programming. Since we will not ordinarily second-guess the choice of entertainment formats, broadcasters are not required, in the first instance, to support their format selection with any formal survey of community preferences.[5] Nor does the fact, standing alone, that members of the community oppose the change indicate that the new format will not also serve the community or that a hearing is necessary. If and when there is a showing of facts before the Commission indicating that the format is not reasonably attuned to community tastes or that the format change will eliminate a service to the public not otherwise available, a survey of entertainment tastes or a hearing may be required.[6] Nothing in the petitions before us now indicates that

[4] Thus, for example, following our approval of plans to discontinue a Denver "all news" station, two other area stations announced their intent to provide "all news" during substantial portions of the day. *Mission Denver, Inc.*, 36 FCC 2d 78 (1972), appeal pending *sub. nom. Lakewood Broadcasting Service* v. *F.C.C.*, Case No. 72–1758 (D.C. Cir.). Similarly, following our approval of a change in a Sylvania, Ohio, station's Progressive Rock format another area station adopted a progressive rock format. *Twin States Broadcasting Co.*, 35 FCC 2d 969 (1972), appeal pending *sub. nom. Citizens Committee to Keep Progressive Rock* v. *F.C.C.*, Case No. 72–1675 (D.C. Cir.).

[5] *Citizens Committee* v. *F.C.C.*, 141 U.S. App. D.C. 119, 436 F.2d 263 (1971), reflects the Court's belief that the availability or unavailability of comparable programming from other stations is an important factor in considering assignment applications which propose format changes. The Commission shares that belief. We do not believe, however, that *Citizens Committee* requires surveys of community tastes absent some showing that the proposed format choice is unreasonable.

[6] *Cf. Robert P. Adams*, 38 FCC 2d 1 (1972), appeal pending *sub nom. Mt. Wilson FM Broadcasters* v. *F.C.C.*, Case No. 72–2068, where the facts initially before the Commission indicated that the proposed format was not reasonably attuned to community tastes. An amendment subsequently filed by the assignee and conditions imposed in the grant eliminated the need for a hearing. See also *Time-Life Broadcast, Inc.*, 36 FCC 2d 646 (1972).

the new format for WEFM will not be reasonably attuned to Chicago tastes and the record shows that classical music programming will still be available on stations in the market.

This policy is consistent with both the regulatory scheme contemplated by Congress and the Commission's policy in other areas involving the sensitive question of programming decisions.[7] Under our system of commercial broadcasting, broadcasters—not the Commission—must choose the programs or program formats they will provide to the public. That broadcasters will seek to make a wise choice is dictated in large measure by the competitive realities of the marketplace. For in the last analysis, broadcasters who fail to divine and serve the unmet entertainment programming preferences of their community will be the financial losers. This is not to say, however, that the Commission should not or does not play a role in this ascertainment process, but rather that its role is wisely limited to one of review.

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[7] For example, in reviewing Fairness Doctrine complaints the Commission will not question an exercise of discretion unless an abuse is shown.